Detik Ria Sdn Bhd v Prudential Corp Holdings Ltd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-40–07 OF 2023(W)
HASNAH HASHIM CJ (MALAYA), NALLINI PATHMANATHAN AND HARMINDAR SINGH FCJJ
6 MARCH 2025

Contract — Agreements — Call/put option agreement and supplemental call/put option agreement — Conditional precedent that requisite mandatory approvals of Minister of Finance under Insurance Act 1996 ('the IA') be obtained prior to performance of contract — IA repealed by Financial Services Act 2013 ('the FSA') — Whether s 67 of the IA or provisions of FSA was applicable — Whether s 67 of the IA to be construed literally or purposively — Whether entry into agreements which contained condition precedent that requisite mandatory approvals be obtained prior to performance of contract was illegal — Whether agreement was illegal contract ab initio — Whether illegality could arise in course of mode of performance of agreement by reason of contravention of s 67 of the IA — Whether there was performance or effective performance of agreements by parties notwithstanding lack of regulatory approval as required under relevant statute — Whether performance of agreements without fulfilment of condition precedent drew consequences — Whether agreements remained specifically enforceable or became void such that specific performance was unavailable — Whether s 66 of the Contracts Act 1950 applicable to determine remedies available to parties

Prudential Assurance Malaysia Bhd ('PAMB') was a licensed insurer whereas Sri Han Suria Sdn Bhd ('SHS') was a 100% shareholder of PAMB. SHS had two shareholders: (a) the second respondent ie The Prudential Assurance Company Ltd ('Prudential Assurance') which held 51% of its shares; and (b) the appellant ie Detik Ria Sdn Bhd ('Detik Ria') which held 49% of its shares. The first respondent ie Prudential Corp Holdings Ltd ('Prudential Corp') was a related company to Prudential Assurance and both were foreign companies incorporated in the United Kingdom ('Prudential'). A call/put option agreement ('CPOA') entered into between Prudential Assurance and Detik Ria. Under the CPOA, Detik Ria agreed to grant a call option to Prudential Assurance and Prudential Assurance agreed to grant Detik Ria a put option. On exercise of the option, Detik Ria's shares in SHS would be sold to and purchased by Prudential Assurance. This would make Prudential the sole shareholder of SHS. As SHS was the sole shareholder of PAMB, the licensed insurer under the Financial Services Act 2013 ('the FSA'), Prudential Assurance would effectively enjoy sole control of the licensed entity. The CPOA was conditional upon the approval of, inter alia, the Minister of Finance, as set out in cl 2.1. In 2009, Prudential Assurance, Detik Ria, the late Tan Sri Datuk

Abdul Rahim bin Haji Din who was a 50% shareholder and a director of Detik Ria and another shareholder of Detik Ria, executed a memorandum of deposit as security for the redemption by Prudential Assurance of 'A' preference shares in SHS, as performance of the obligations under the CPOA. Prudential Assurance and Detik Ria then entered into a supplemental call/put option agreement ('SCPOA') where they agreed, inter alia, that the completion date of the put option had been deferred 'until such date or dates without limit in point of time', namely until Prudential Assurance was able to purchase (or to procure such person(s) acceptable to Bank Negara to purchase) the option shares. The SCPOA also amended the terms of the CPOA. On the same date, Prudential Assurance, Detik Ria and Detik Ria's shareholders executed a supplemental memorandum of deposit whereby a further charge was created over the 49,000 ordinary shares in SHS in favour of Prudential Assurance. Between 2009 to 2019, Detik Ria received a total of RM109,205,290.50 and Prudential Assurance received dividends totalling RM4.2 billion while Detik Ria received no dividends. On 30 June 2013, the FSA came into force and repealed the Insurance Act 1996 ('the IA'). Under the FSA, instead of obtaining the requisite approval from the Minister of Finance pursuant to s 67(1) of the IA, approval was to be obtained from Bank Negara pursuant to s 87(1) of the FSA. Nearly ten years after Detik Ria issued a notice to exercise the put option and received part payment of the purchase price, Detik Ria wrote to Prudential Corp Asia to rescind the exercise of the put option and maintain its 49% shareholding in SHS. The reason Detik Ria sought to rescind the put option agreement was the non-completion of the divestment of its 49% shareholding in SHS to Prudential. Prudential Corp Asia replied that the put option exercise was valid, irrevocable, with no grounds for its rescission, and that Prudential intended to complete the acquisition of the option shares once the requisite regulatory approvals were obtained. Prudential had been trying to obtain Bank Negara's approval for the put option exercise. Bank Negara conveyed its approval in principle to Prudential Corp in May 2018. However, there was no mention of the consent of the Minister which was essential for compliance with the law. Therefore, as of this date, there was no approval from the Minister of Finance for the acquisition under the CPOA. Prudential Corp Asia issued a letter to Detik Ria enclosing the necessary documents to complete Prudential Corp's acquisition of the option shares. Detik Ria replied stating that the methodology for computation of the put option price was misleading and unreasonable and it would not complete the transfer of the 49% equity interest in SHS. Nevertheless, Detik Ria accepted the part payment of RM5,684,396. Prudential Assurance assigned all of its rights and benefits under the various agreements to Prudential Corp by way of a deed of assignment pursuant to cl 11 of the CPOA. In 2019, Prudential filed an originating summons against Detik Ria and the late Tan Sri Datuk Abdul Rahim to seek recognition of the arrangement between the parties. Detik Ria and the late Tan Sri Datuk Abdul Rahim counterclaimed against Prudential for restitution. They sought, among others, a declaration that the CPOA and the supplements thereto were illegal

and unenforceable and that Prudential was to pay Detik Ria RM2.2 billion plus, being 49% of the shareholding dividends declared by SHS from 2009 to 2019. The High Court upheld the CPOA as the High Court judge found that: (i) it was not illegal; and (ii) it was a conditional contract where the obligations of the parties would only be legally enforceable upon obtaining the approval from Bank Negara. The Court of Appeal affirmed the High Court decision. The Court of Appeal found that: (1) the applicable law was the IA; (2) taking a purposive approach, the legislative intent behind the enactment of s 67 of the IA was that approval from Bank Negara must be obtained if the agreement entered into would lead to the acquisition or disposal of the share; (3) the prohibition in law was not against the entering into of a contract, but the carrying out of the contact which would lead to the acquisition or disposal of more than 5% shares without the prior approval of Bank Negara. Therefore, the 'prior written approval' did not need to be obtained when the CPOA was entered into, and the CPOA was valid even though approval was not obtained prior to its execution; and (4) the CPOA was not illegal or void or invalid. Hence, this appeal.

Held, allowing the appeal:

(1) Paragraph (c) of s 272 of the FSA did not apply to the approval sought from Bank Negara because such application for approval was only made in April 2018 after the FSA had come into force on 30 June 2013. It was para (l) which was applicable and which preserved the right, benefit, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts that applied to the present appeal. There was no express provision making the provisions of the FSA retrospective in effect. By reason of s 272(l) of the FSA, the relevant applicable statutory provision was s 67 of the IA. The parties would be governed by the IA which was the law in force at the time of entry into the CPOA. The parties were also governed by the IA for the reason that at the time of entry into the agreement, parties only had knowledge of the IA as the law binding upon them. Thus, it was mandatory for Prudential to obtain the consent of the Minister of Finance before the agreement was performed or carried out (see para 67).

(2) In light of the existence of s 17A of the Interpretation Acts 1948 and 1976, the statute-prescribed approach necessarily outflanked the common law approach. And s 17A prescribed an approach that took into account the purpose and object of the law in construing the text in issue. Therefore, all construction should take into account the purpose and object of the legislation in question. Section 67 of the IA was enacted with the aim and purpose of prohibiting the performance of an agreement for a dealing in shares in an insurer in excess of 5% without the consent of the Minister of Finance (see paras 73 & 79).

(3) Section 67 of the IA did not support the contention that the entry into an agreement for such acquisition or disposal of shares on condition that the Minister's approval be procured, was prohibited. Clause 2.1 of the CPOA contained a condition precedent to the effect that the consent of the Minister was to be obtained. The contract only came into existence under the said clause when the requisite consent was obtained. The CPOA when entered into did not involve any actual 'dealing' in the subject shares of Detik Ria in SHS. As the contract for the actual dealing in shares could not come into existence until the condition precedent was satisfied, there could not be, and there was, in effect, no effective dealing in the shares. The entry into the CPOA in itself, did not amount to a disposal or acquisition by either Prudential or Detik Ria in more than 5% of the shareholding of SHS. The parties could not be said to have entered into the CPOA with an intention to contravene s 67 of the IA. The CPOA was not contemplated to be for an illegal purpose by either or both of the parties as the existence of the express condition precedent evidences the fact that both Prudential and Detik Ria fully intended to comply with the law. Given that conditional contracts did not come into force or existence until the condition precedent was fulfilled, it followed that entry into such a contract did not, per se, render the same illegal or void (see paras 82–84, 86 & 89).

(4) The CPOA on entry was a legal, valid, and binding contract between the parties, being a conditional contract with a condition precedent in cl 2.1 which precluded it from being performed until the requisite consent inter alia of the Minister under s 67 of the IA had been obtained. Further, neither party, in either the High Court or the Court of Appeal, noted or brought up the alleged illegality of the Minister's lack of approval. There was no intent or act on the part of either party to avoid obtaining the approval of the Minister of Finance. Therefore, it could not be said that the contract had an unlawful 'object' such that it became void (see paras 90 & 98).

(5) Agreements for the disposal or acquisition of more than a 5% shareholding in the insurer without the permission of the Minister were void under the statute. While the CPOA was clearly not within the category of prohibited contracts when entered into in 2002, its status and content altered considerably both in 2009 and by 2018. Many parts of the CPOA which related to the operational functioning of SHS had changed by then. However, in all this time the Minister's consent was not obtained. Thus, the contract contravened an essential or core statutory requirement of the IA, and may no longer be enforceable by the parties, or the party seeking to enforce the agreement unilaterally (see paras 111 & 113).

(6) The factual matrix over a period of 16 years, with particular emphasis between 2009 and 2018, disclosed that the CPOA and SCPOA were substantively put into effect, such that Prudential enjoyed a degree of control and authority over the option shares which enabled it to effectively determine how SHS, the insurer, was to take decisions or function. This was not compatible with Detik Ria having real ownership of the 49% as would be expected from a perusal of the share register. The issue of whether there had in fact been performance, in part or otherwise, to be a contentious issue as the affidavits filed in relation to the originating summons contained conflicting issues of fact. The documentary evidence produced in the course of the hearing provided the best basis on which to assess this issue of whether there had been performance or not. This in turn determined whether there was a contravention of the regulatory requirements or not. The CPOA and the SCPOA were effectively or substantially performed (see paras 132–133, 135 & 137).

(7) The CPOA and SCPOA were substantially or effectively performed without the consent of the Minister of Finance between 2009 and 2018. Such performance was therefore carried out in contravention of s 67 of the IA. Where such an essential requirement was not complied with, the court could not give effect to the agreement and such a contravention rendered the CPOA and the SCPOA unenforceable. The effect of performance was that the share option agreement namely the sale and acquisition of the shares was completed, such that the consent of the Minister of the Finance could no longer be obtained as the ownership of the shares had effectively passed to Prudential, save in title. The Minister could not give consent for agreements that had already been performed (see paras 138–139 & 142–143).

(8) The CPOA and SCPOA were not agreements that were void ab initio, but agreements which became prohibited by statute, and therefore unlawful and consequently, void. The agreements became void due to an application of s 33 of the Contracts Act 1950 ('the CA'). The contract was contingent upon the event of the Minister of Finance's consent. Since the consent was never given, the CPOA and SCPOA were void (see paras 146–148 & 152).

(9) Since the contract was found to be one that became void, s 66 of the CA was relevant and applicable to determine the remedial obligations of the parties. The parties might well receive an unjust windfall should s 66 of the CA not be applied. The purchase price of RM109m odd paid to Detik Ria was for the shares of SHS. Now that Prudential was no longer acquiring those shares, it was only fair and equitable that the purchase price was returned in full. To determine otherwise would enable Detik Ria to retain its 49% shareholding as well as the purchase price of the

same, while Prudential would be constrained to bear the loss of the purchase price. Equally Prudential might well have received dividends of a considerable amount which Detik Ria complained it was deprived of. This too would be untenable. The restoration of parties to the position they were in at the outset served to provide an appropriate remedy which was fair and just. More importantly its application was expressly provided for in the CA in respect of contracts which 'become void' (see paras 153 & 175).

[Bahasa Malaysia summary

Prudential Assurance Malaysia Bhd ('PAMB') adalah satu syarikat insurans berlesen manakala Sri Han Suria Sdn Bhd ('SHS') adalah pemegang saham 100% PAMB. SHS mempunyai dua pemegang saham: (a) responden kedua iaitu The Prudential Assurance Co Ltd ('Prudential Assurance') yang memegang 51% sahamnya; dan (b) perayu iaitu Detik Ria Sdn Bhd ('Detik Ria') yang memegang 49% sahamnya. Responden pertama iaitu Prudential Corp Holdings Ltd ('Prudential Corp') adalah syarikat berkaitan dengan Prudential Assurance dan kedua-duanya adalah syarikat asing yang diperbadankan di United Kingdom ('Prudential'). Satu perjanjian pilihan membeli/menjual ('CPOA') telah dimeterai antara Prudential Assurance dan Detik Ria. Di bawah CPOA, Detik Ria bersetuju untuk memberi pilihan membeli kepada Prudential Assurance dan Prudential Assurance bersetuju untuk memberi pilihan menjual kepada Detik Ria. Apabila pilihan itu dilaksanakan, saham Detik Ria dalam SHS akan dijual kepada dan dibeli oleh Prudential Assurance. Ini akan menjadikan Prudential sebagai pemegang saham tunggal SHS. Memandangkan SHS adalah pemegang saham tunggal PAMB, syarikat insurans berlesen di bawah Akta Perkhidmatan Kewangan 2013 ('APK'), Prudential Assurance akan secara menikmati kawalan tunggal ke atas entiti berlesen tersebut. CPOA adalah tertakluk kepada kelulusan, antara lain, Menteri Kewangan, seperti yang dinyatakan dalam klausa 2.1. Pada tahun 2009, Prudential Assurance, Detik Ria, arwah Tan Sri Datuk Abdul Rahim bin Haji Din yang merupakan pemegang saham 50% dan pengarah Detik Ria dan seorang pemegang saham lain Detik Ria, melaksanakan memorandum deposit sebagai jaminan untuk penebusan oleh Prudential Assurance bagi saham keutamaan 'A' dalam SHS, sebagai pelaksanaan kewajipan di bawah CPOA. Prudential Assurance dan Detik Ria kemudian memeterai perjanjian pilihan membeli/menjual tambahan ('SCPOA') di mana mereka bersetuju, antara lain, bahawa tarikh penyelesaian pilihan menjual telah ditangguhkan 'sehingga tarikh atau tarikh-tarikh tanpa had dari segi masa', iaitu sehingga Prudential Assurance dapat membeli (atau memperoleh orang yang boleh diterima oleh Bank Negara untuk membeli) saham pilihan tersebut. SCPOA juga meminda terma-terma CPOA. Pada tarikh yang sama, Prudential Assurance, Detik Ria dan pemegang saham Detik Ria melaksanakan memorandum deposit tambahan di mana satu gadaian lagi telah dibuat ke atas 49,000 saham biasa dalam SHS bagi pihak Prudential Assurance. Antara tahun 2009 hingga 2019,

Detik Ria menerima jumlah RM109,205,290.50 dan Prudential Assurance menerima dividen berjumlah RM4.2 billion sementara Detik Ria tidak menerima sebarang dividen. Pada 30 Jun 2013, APK berkuat kuasa dan memansuhkan Akta Insurans 1996 ('AI'). Di bawah APK, daripada mendapatkan kelulusan yang diperlukan daripada Menteri Kewangan menurut s 67(1) AI, kelulusan harus diperoleh daripada Bank Negara menurut s 87(1) APK. Hampir sepuluh tahun selepas Detik Ria mengeluarkan notis untuk melaksanakan pilihan menjual dan menerima sebahagian pembayaran harga pembelian, Detik Ria menulis kepada Prudential Corp Asia untuk membatalkan pelaksanaan pilihan menjual tersebut dan mengekalkan pegangan 49% sahamnya dalam SHS. Sebab Detik Ria ingin membatalkan perjanjian pilihan menjual adalah kerana tiada penyelesaian pelupusan 49% sahamnya dalam SHS kepada Prudential. Prudential Corp Asia membalas bahawa pelaksanaan pilihan menjual adalah sah, tidak boleh dibatalkan, tanpa sebab untuk pembatalannya, dan bahawa Prudential berniat untuk menyelesaikan pemerolehan saham pilihan apabila kelulusan kawal selia yang diperlukan diperolehi. Prudential telah berusaha untuk mendapatkan kelulusan Bank Negara untuk pelaksanaan pilihan menjual. Bank Negara menyampaikan kelulusannya secara prinsip kepada Prudential Corp pada bulan Mei 2018. Namun, tidak ada sebutan tentang kebenaran Menteri yang penting bagi pematuhan undang-undang. Oleh itu, pada tarikh ini, tidak ada kelulusan daripada Menteri Kewangan untuk pemerolehan di bawah CPOA. Prudential Corp Asia mengeluarkan surat kepada Detik Ria yang menyertakan dokumen yang diperlukan untuk menyelesaikan pemerolehan saham pilihan oleh Prudential Corp. Detik Ria membalas dengan menyatakan bahawa metodologi pengiraan harga pilihan menjual adalah mengelirukan dan tidak munasabah dan bahawa ia tidak akan menyelesaikan pemindahan kepentingan ekuiti 49% dalam SHS. Walau bagaimanapun, Detik Ria menerima sebahagian pembayaran sebanyak RM5,684,396. Prudential Assurance menyerahkan semua hak dan faedahnya di bawah pelbagai perjanjian kepada Prudential Corp melalui surat ikatan penyerahan hak mengikut klausa 11 CPOA. Pada tahun 2019, Prudential memfailkan saman pemula terhadap Detik Ria dan arwah Tan Sri Datuk Abdul Rahim bagi mendapatkan pengiktirafan tentang perjanjian antara pihak-pihak. Detik Ria dan arwah Tan Sri Datuk Abdul Rahim menuntut balas terhadap Prudential bagi pembayaran semula. Mereka menuntut, antara lain, satu pengisytiharan bahawa CPOA dan tambahan-tambahannya adalah tidak sah dan tidak boleh dikuatkuasakan dan bahawa Prudential harus membayar Detik Ria sebanyak RM2.2b serta, yang merupakan 49% daripada dividen pegangan saham yang diisytiharkan oleh SHS dari tahun 2009 hingga 2019. Mahkamah Tinggi mengekalkan CPOA setelah hakim Mahkamah Tinggi mendapati bahawa: (i) ia tidak menyalahi undang-undang; dan (ii) ia adalah kontrak bersyarat di mana kewajipan pihak-pihak hanya akan boleh dikuatkuasakan secara undang-undang setelah mendapatkan kelulusan daripada Bank Negara. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Mahkamah Rayuan mendapati

bahawa: (1) undang-undang yang berkenaan adalah AI; (2) dengan mengambil pendekatan bertujuan, niat perundangan di sebalik penggubalan s 67 AI adalah bahawa kelulusan daripada Bank Negara mesti diperolehi jika perjanjian yang dimeterai akan membawa kepada pemerolehan atau pengeluaran saham; (3) larangan dalam undang-undang bukanlah terhadap terjalinnya kontrak, tetapi terhadap pelaksanaan kontrak yang akan membawa kepada pemerolehan atau pengeluaran lebih daripada 5% saham tanpa kelulusan Bank Negara terlebih dahulu. Oleh itu, 'kelulusan bertulis terdahulu' tidak perlu diperolehi apabila CPOA dimeterai, dan CPOA adalah sah walaupun kelulusan tidak diperolehi sebelum pelaksanaannya; dan (4) CPOA tidak menyalahi undang-undang atau tidak sah atau tidak berkuatkuasa. Oleh itu, rayuan ini.

Diputuskan, rayuan dibenarkan:

(1) Perenggan (c) s 272 APK tidak terpakai kepada kelulusan yang dipohon daripada Bank Negara kerana permohonan untuk kelulusan tersebut hanya dibuat pada bulan April 2018 setelah APK berkuat kuasa pada 30 Jun 2013. Perenggan (l) adalah terpakai dan yang memelihara hak, faedah, keistimewaan, kewajipan atau liabiliti yang diperolehi, berlaku atau ditanggung di bawah Akta yang telah dimansuhkan yang terpakai kepada rayuan ini. Tiada peruntukan jelas yang menjadikan peruntukan APK berkuat kuasa secara retrospektif. Oleh sebab s 272(l) APK, peruntukan perundangan yang terpakai adalah s 67 AI. Pihak-pihak akan tertakluk kepada AI yang merupakan undang-undang yang berkuat kuasa pada masa kemasukan CPOA. Pihak-pihak juga tertakluk kepada AI kerana pada masa mereka memasuki perjanjian, pihak-pihak hanya mengetahui tentang AI sebagai undang-undang yang mengikat mereka. Oleh itu, adalah menjadi kewajipan bagi Prudential untuk mendapatkan kebenaran Menteri Kewangan sebelum perjanjian dilakukan atau dilaksanakan (lihat perenggan 67).

(2) Mengambil kira kewujudan s 17A Akta Tafsiran 1948 dan 1976, pendekatan yang ditetapkan oleh statut semestinya mengatasi pendekatan undang-undang am. Seksyen 17A menetapkan pendekatan yang mengambil kira tujuan dan objek undang-undang dalam mentafsirkan teks yang dipertikaikan. Oleh itu, semua tafsiran harus mengambil kira tujuan dan objek perundangan yang berkenaan. Seksyen 67 AI telah digubal dengan tujuan dan matlamat untuk melarang pelaksanaan perjanjian bagi urus niaga dalam saham insurans yang melebihi 5% tanpa kebenaran Menteri Kewangan (lihat perenggan 73 & 79).

(3) Seksyen 67 AI tidak menyokong pendapat bahawa kemasukan perjanjian untuk pemerolehan atau pelupusan saham dengan syarat bahawa kelulusan Menteri perlu diperolehi, adalah dilarang. Klausa 2.1 CPOA

mengandungi syarat pendahuluan yang menyatakan bahawa kebenaran Menteri perlu diperolehi. Kontrak hanya wujud di bawah klausa tersebut apabila kebenaran yang diperlukan diperolehi. CPOA yang dimeterai tidak melibatkan sebarang 'urus niaga' sebenar dalam saham Detik Ria dalam SHS. Oleh kerana kontrak untuk urus niaga sebenar dalam saham tidak boleh wujud sehingga syarat pendahuluan dipenuhi, tiada urus niaga yang berkesan wujud dalam saham tersebut. Memasuki CPOA itu sendiri, tidak sama dengan pelupusan atau pemerolehan oleh Prudential atau Detik Ria dalam lebih daripada 5% pegangan saham SHS. Pihak-pihak tidak boleh dikatakan telah memasuki CPOA dengan niat untuk melanggar s 67 AI. CPOA tidak dirancang untuk tujuan yang tidak sah oleh mana-mana atau kedua-dua pihak memandangkan kewujudan syarat pendahuluan yang jelas menunjukkan bahawa kedua-dua Prudential dan Detik Ria berniat untuk mematuhi undang-undang. Memandangkan kontrak bersyarat tidak berkuat kuasa atau wujud sehingga syarat pendahuluan dipenuhi, maka kemasukan kontrak tersebut tidak, dengan sendirinya, menjadikannya tidak sah atau terbatal (lihat perenggan 82–84, 86 & 89).

(4) CPOA pada saat dimeterai adalah kontrak yang sah dan mengikat antara pihak-pihak, sebagai kontrak bersyarat dengan syarat pendahuluan dalam klausa 2.1 yang menghalangnya daripada dilaksanakan sehingga kebenaran yang diperlukan, antara lain, daripada Menteri di bawah s 67 AI diperolehi. Selanjutnya, tiada pihak, sama ada di Mahkamah Tinggi atau Mahkamah Rayuan, yang menyatakan atau mengemukakan isu kesalahan undang-undang yang didakwa berhubung ketiadaan kelulusan Menteri. Tiada niat atau tindakan daripada mana-mana pihak untuk mengelakkan mendapatkan kelulusan Menteri Kewangan. Oleh itu, tidak boleh dikatakan bahawa kontrak tersebut mempunyai 'objektif' yang tidak sah sehingga ia menjadi terbatal (lihat perenggan 90 & 98).

(5) Perjanjian untuk pelupusan atau pemerolehan lebih daripada 5% pegangan saham dalam syarikat insurans tanpa izin Menteri adalah terbatal di bawah statut. Walaupun CPOA jelas tidak termasuk dalam kategori kontrak yang dilarang ketika dimeterai pada tahun 2002, status dan kandungannya telah berubah dengan ketara pada tahun 2009 dan 2018. Banyak bahagian CPOA yang berkaitan dengan fungsi operasi SHS telah berubah pada masa itu. Namun, selama ini kebenaran Menteri tidak diperolehi. Oleh itu, kontrak itu melanggar satu keperluan perundangan yang penting atau asas dalam AI, dan tidak lagi boleh dikuatkuasakan oleh pihak-pihak, atau pihak yang ingin menguatkuasakan perjanjian secara unilateral (lihat perenggan 111 & 113).

(6) Matriks fakta selama 16 tahun, dengan penekanan khusus antara 2009 dan 2018, menunjukkan bahawa CPOA dan SCPOA secara substantif

telah dilaksanakan, sehingga Prudential menikmati tahap pengawalan dan kuasa ke atas saham pilihan yang membolehkan ia menentukan secara berkesan bagaimana SHS, syarikat insurans, seharusnya membuat keputusan atau berfungsi. Ini tidak selaras dengan Detik Ria yang mempunyai pemilikan sebenar 49% seperti yang boleh dijangka dari semakan daftar saham. Isu sama ada terdapat pelaksanaan, sebahagian atau sebaliknya, menjadi isu yang dipertikaikan kerana afidavit yang difailkan berkaitan dengan saman pemula mengandungi isu fakta yang bertentangan. Keterangan dokumentari yang dikemukakan semasa pendengaran memberikan asas terbaik untuk menilai isu sama ada terdapat pelaksanaan atau tidak. Ini seterusnya menentukan sama ada terdapat pelanggaran keperluan kawal selia atau tidak. CPOA dan SCPOA secara berkesan atau substantif telah dilaksanakan (lihat perenggan 132–133, 135 & 137).

(7) CPOA dan SCPOA telah dilaksanakan secara substantif atau berkesan tanpa kebenaran Menteri Kewangan antara 2009 dan 2018. Oleh itu, pelaksanaan tersebut dilakukan bertentangan dengan s 67 AI. Apabila keperluan yang penting ini tidak dipatuhi, mahkamah tidak dapat memberikan kesan kepada perjanjian tersebut dan pelanggaran seperti itu menjadikan CPOA dan SCPOA tidak boleh dikuatkuasakan. Kesan pelaksanaan adalah bahawa perjanjian pilihan saham, iaitu penjualan dan pemerolehan saham telah diselesaikan, dan kebenaran Menteri Kewangan tidak lagi dapat diperolehi kerana pemilikan saham telah secara berkesan berpindah kepada Prudential, kecuali dari segi hak milik. Menteri tidak dapat memberikan kebenaran untuk perjanjian yang telah dilaksanakan (lihat perenggan 138–139 & 142–143).

(8) CPOA dan SCPOA bukanlah perjanjian yang terbatal ab initio, tetapi perjanjian yang menjadi dilarang oleh statut, dan oleh itu adalah tidak sah dan seterusnya terbatal. Perjanjian tersebut menjadi terbatal kerana aplikasi s 33 Akta Kontrak 1950 ('CA'). Kontrak adalah bersyarat atas kejadian kelulusan Menteri Kewangan. Oleh kerana kelulusan tidak pernah diberikan, CPOA dan SCPOA adalah terbatal (lihat perenggan 146–148 & 152).

(9) Memandangkan kontrak didapati sebagai kontrak yang terbatal, s 66 CA adalah relevan dan terpakai untuk menentukan kewajipan pembetulan pihak-pihak. Pihak-pihak mungkin akan menerima untung yang tidak adil jika s 66 CA tidak diterapkan. Harga pembelian sekitar RM109 juta yang dibayar kepada Detik Ria adalah untuk saham SHS. Kini, apabila Prudential tidak lagi memperoleh saham tersebut, adalah adil dan saksama bahawa harga pembelian dikembalikan sepenuhnya. Menentukan sebaliknya akan membolehkan Detik Ria mengekalkan pegangan saham 49% serta harga pembelian yang sama, manakala Prudential akan terbatas untuk menanggung kerugian harga pembelian.

Secara sama, Prudential mungkin telah menerima dividen yang agak besar yang Detik Ria mengadu telah dirampas. Ini juga tidak akan dapat dipertahankan. Pemulihan pihak-pihak kepada kedudukan mereka pada awalnya memberikan remedi yang sesuai yang adil dan saksama. Lebih penting lagi, pelaksanaannya telah secara jelas dinyatakan dalam CA berkenaan dengan kontrak yang 'menjadi terbatal' (lihat perenggan 153 & 175).]

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Contracts Act 1872 [IN] s 65
Contracts Act 1950 ss 24, 24(a), (b), 33, 66, Part V
Financial Services Act 2013 ss 87(1), 270, 272(c), (l)
Insurance Act 1996 (repealed by the Financial Services Act 2013) ss 67, 67(1), 68, 96

Interpretation Acts 1948 and 1967 s 17A
Merchant Shipping (Safety and Load Line Conventions) Act 1932 [UK] ss 44, 55
Moneylenders Act 1951 s 5(2)

Appeal from: *Detik Ria Sdn Bhd & Anor v Prudential Corp Holding Ltd & Anor* [2022] 5 MLJ 541 (Court of Appeal, Putrajaya)

Tommy Thomas (with Tey Jun Ren, Mervyn Lai and Chuar Kia Lin) (Pierre Chuah & Assoc) for the appellants.
Cyrus Das (with Bastian Vendargon, Gene Vendargon, Saritha Devi Kirupalani with Nur Ainnabila Rosdi) (Firoz Julian) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] These are our full grounds of judgment delivered after the issuance of our ex tempore grounds handed down immediately after the hearing of this appeal on 30 July 2024.

[2] The pivotal issue in this appeal turns on:

(a) whether two call and put option agreements in relation to the acquisition and disposal of a 49% shareholding in the controller of an 'insurer' as defined under the Insurance Act 1996, are valid conditional or contingent contracts, and can consequently be specifically performed notwithstanding the non-procurement of the consent of the Minister of Finance; or

(b) whether these agreements are invalid and cannot be specifically enforced for that same reason, namely the non-procurement of the consent of the Minister of Finance under s 67 of the Insurance Act 1996.

[3] Section 67 requires the approval of the Minister to be obtained prior to entry into, and the carrying out of, the said agreements. It provides in essence that all agreements resulting in the acquisition or disposal of an aggregate of 5% in the shareholding of the controller of a licensed insurer required the consent of the Minister of Finance. The agreements in issue contained a condition precedent that the obligations of the parties would only come into force upon the obtaining of the consent of the Minister of Finance.

[4] It is not in dispute that such consent was never obtained. The Insurance Act 1996 has since been repealed by the Financial Services Act 2013 (the relevant applicable legislation at the time of the dispute was an issue between the parties).

[5] Nearly 16 years after the entry into the first agreement and some nine years after the entry into the supplementary agreement the Minister's consent was not obtained. Despite not obtaining the Minister's consent for the agreements, we found that parties proceeded to act on the agreements.

[6] In the courts below both parties' cases, as put forward to those courts, centred *not on whether the Minister of Finance's consent was obtained but on whether Bank Negara's approval had been obtained*. The requirement for the Minister of Finance to give his consent was not a central issue. Both the High Court and Court of Appeal upheld the agreements as being valid and specifically enforceable.

[7] It was on appeal to this court that the issue of the lack of consent of the Minister of Finance was raised and became the central issue. Leave was granted for the full merits of the consequences on the agreements, of such lack of consent from the Minister, to be ventilated in full.

[8] It is a matter of importance because it touches on whether such failure to obtain the requisite consent resulted in a contravention of the statute, and the consequences of such a contravention. The relevant legislation to be applied was also in issue as the appellant, Detik Ria maintained that the Insurance Act 1996 prevailed while the respondents, Prudential Corp Holdings Ltd and The Prudential Assurance Co Ltd maintained that the Financial Services Act 2013 was the relevant legislation to be applied. The latter required Bank Negara's approval rather than that of the Minister of Finance.

[9] Ultimately, we found in favour of the appellant, reversing the decision of the courts below. We now give our full reasons for so doing. We commence with the material facts.

THE PARTIES

[10] Prudential Assurance Malaysia Bhd ('PAMB') is a licensed insurer meaning it is a company licensed to conduct the business of underwriting insurance within the meaning of the Insurance Act 1996 and since its repeal, the Financial Services Act 2013 ('the FSA').

[11] Sri Han Suria Sdn Bhd ('SHS') is a 100% shareholder of PAMB. For the purposes of s 67 of the Insurance Act, it is the 'controller' of the licensed insurer. SHS has two shareholders, as follows:

(a) the second respondent before us, The Prudential Assurance Co Ltd ('Prudential Assurance') which held 51% of its shares; and

(b) the first appellant before us, Detik Ria Sdn Bhd ('Detik Ria'), which held 49% of its shares.

[12] Prudential Corp Holdings Ltd ('Prudential Corp') is a related company to Prudential Assurance. Both are foreign companies incorporated in the United Kingdom and together they filed an originating summons in the High Court (they are collectively referred to as 'Prudential') against Detik Ria and the late Tan Sri Datuk Abdul Rahim bin Hj Din.

[13] The late Tan Sri Datuk Abdul Rahim was a 50% shareholder and a director of Detik Ria. He was Detik Ria's nominee director on the board of SHS. He was named as the second defendant in the originating summons to compel him to execute the director's resignation letter. However, he passed away in December 2022 and on 20 February 2024, his lawyers filed a notice of discontinuance of his appeal against the respondents.

THE AGREEMENT

[14] The relationship between the parties began as far back as 1998, but for purposes of the present appeal, the relevant agreement is the call/put option agreement ('CPOA') agreement entered into between Prudential Assurance and Detik Ria on 27 February 2002. Under the CPOA, Detik Ria agreed to grant a call option to Prudential Assurance and Prudential Assurance agreed to grant Detik Ria a put option. On exercise of the option, Detik Ria's shares in SHS would be sold to and purchased by Prudential Assurance. This would make Prudential the sole shareholder of SHS. As SHS is the sole shareholder of PAMB, the licensed insurer under the FSA 2013, Prudential Assurance would effectively enjoy sole control of the licensed entity.

[15] For the purposes of this appeal the central issue, as explained above is that the CPOA is conditional upon the approval of, inter alia, the Minister of Finance, as set out in cl 2.1. It provides as follows:

> 2.1 The obligations of the Parties hereto under this Agreement shall be conditional upon the approval of FIC, the Minister of Finance, BNM and any other relevant regulatory authorities in Malaysia to the grant of the options and the sale of the Option Shares and the Option Preference Shares or the PAMB Shares, as applicable, hereunder being obtained.

[16] The salient terms of the CPOA include:

(a) the obligations of the parties are conditional upon the approval of other relevant authorities (cl 2.1);

(b) if the condition relating to obtaining the approval of the Minister of Finance is not fulfilled by the cut-off date, the CPOA shall be deemed to

A be terminated, and be deemed null and void (cl 2.3);

(c) the cut-off date is 90 days from execution of the CPOA or such later date as may be mutually agreed between the parties (definition in cl 1.1);

B (d) when the condition under cl 2.1 is fulfilled, the CPOA will cease to be conditional (cl 2.4);

(e) Detik Ria agreed to grant a call option to Prudential Assurance which would require Detik Ria to sell the option shares to Prudential Assurance (cl 3);

C (f) the option shares are 49,000 ordinary shares in HoldCo (the previous name of SHS) representing 49% shares in SHS held by Detik Ria (definition in cl 1.1);

(g) Prudential Assurance agreed to grant Detik Ria a put option of the D option shares (cl 4);

(h) put option is defined to mean Detik Ria's right to require Prudential Assurance to purchase (or to procure such person(s) acceptable to Bank Negara to purchase) the option shares or any part of the same from Detik Ria pursuant to cl 4.1, exercisable during the put option period E (definition in cl 1.1);

(i) the put option period is stipulated to be 12 years from the date of the CPOA;

F (j) the put option is exercisable anytime during the put option period or such later date as may be mutually agreed between the parties (cl 4.2(a));

(k) if Detik Ria exercised the put option but Prudential Assurance was unable to purchase the option shares due to the prevailing regulatory government policies in Malaysia relating to foreign shareholding, the G completion of the sale and purchase would be deferred until Prudential Assurance was able to purchase (or to procure such person(s) acceptable to Bank Negara to purchase) the option shares, with the condition that Prudential Assurance pay Detik Ria part payment of the purchase consideration, calculated at the stipulated formula on the date 75 days H from the date of the option notice issued Detik Ria. Until the deferred completion of the put option and payment of the balance purchase consideration, Detik Ria was to remain the beneficial owner of the option shares (cl 4.2(b)).

I **[17]** On 15 December 2008, Detik Ria issued a notice to exercise the put option to Prudential Assurance. The purchase consideration was calculated to be RM114,120,328.77.

[18] On 12 April 2009, Prudential Assurance as the chargee, Detik Ria as

the chargor, the late Tan Sri Datuk Abdul Rahim bin Haji Din and another shareholder of Detik Ria executed a memorandum of deposit as security for the redemption by Prudential Assurance of 'A' preference shares in SHS, as performance of the obligations under the CPOA. Although the 'A' preference shares are not the subject of this appeal, the memorandum of deposit is significant as it provided, inter alia, that:

(a) Detik Ria and its shareholders are *prohibited from dealing with its 49 % shareholding in SHS, without the prior written consent of Prudential Assurance* (cl 7.1(i));

(b) Detik Ria and its shareholders *would vote at meetings of the Board of Directors of Detik Ria and/or SHS in such manner as to not prejudice the interests of Prudential Assurance and, if so reasonably required by Prudential Assurance, vote at such Board meetings and general meetings in the manner directed by Prudential Assurance* (cl 7.1(iii)); and

(c) *Prudential Assurance is entitled at any time* without notice to Detik Ria or its shareholders, *and without Detik Ria's or its shareholders' consent, to complete the blank share transfer forms deposited with Prudential Assurance and effect the transfer of the shares to Prudential Assurance or any other person that Prudential Assurance may think fit* (subject to cl 2.1 of the CPOA) (cl 3.3).

[19] The memorandum of deposit showed that while the parties seemingly recognised Detik Ria as the beneficial owner of its 49% shareholding in SHS, Prudential Assurance could effect the transfer of the shares without notice to Detik Ria. However, Detik Ria could not deal with the shares without prior written consent of Prudential Assurance. It also provided that Detik Ria had to vote under the direction of Prudential Assurance.

[20] On 9 September 2009, Prudential Assurance and Detik Ria entered into a *supplemental call/put option agreement* ('SCPOA') where they agreed, inter alia, that the completion date of the put option has been deferred 'until such date or dates without limit in point of time', namely until Prudential Assurance was able to purchase (or to procure such person(s) acceptable to Bank Negara to purchase) the option shares. The SCPOA also amended the terms of the CPOA. Among others, *it modified the formula to compute the purchase consideration and it deleted the definition of 'put option period' which the CPOA set at 12 years*.

[21] On the same date, Prudential Assurance as the chargee, Detik Ria as the chargor, and Detik Ria's shareholders executed a *supplemental memorandum of deposit* whereby a further charge was created over the 49,000 ordinary shares in SHS in favour of Prudential Assurance. This essentially put Prudential Assurance in a position of trust, as it held the shares for the benefit of any entity

A deemed appropriate by it and Bank Negara or the Minister of Finance.

[22] Between 2009 to 2019, Detik Ria received a total of RM109,205,290.50. The payments are tabulated in para 43 of Prudential's affidavit in support of its originating summons affirmed by one Kieran Devlin on 17 September 2019. The SPOA provided for a three-year instalment plan but since 2016, Prudential complied with Detik Ria's request for the payments to be made within a shorter interval, ie 18 months apart.

[23] Between 2009 to 2018, Prudential Assurance as the sole holder of 'A' preference shares in SHS received dividends totaling RM4.2 billion while Detik Ria received no dividends. Prudential stated in its submissions that among the resolutions passed by Detik Ria as a shareholder of SHS, were resolutions in respect of the payment of dividends to the preference shareholder of SHS. However, at the hearing before us in the Federal Court, the issue of whether dividends were in fact paid to Prudential became a point of dispute and we dealt with it in the manner below.

[24] On 30 June 2013, the FSA 2013 came into force and repealed the Insurance Act 1996. We will deal with the parties' submissions on the applicable law in the course of our analysis below, but at this juncture it is sufficient to mention that the significance of this date is because under the FSA 2013, instead of obtaining the requisite approval from the Minister of Finance pursuant to s 67(1) of the Insurance Act 1996, approval was to be obtained from Bank Negara pursuant to s 87(1) of the FSA 2013.

[25] The courts below seemed to have equated Bank Negara's approval in principle with the Minister of Finance's approval, but these entities are two different authorities. The question of which regulatory authority's approval was to be obtained depends on the relevant law governing the agreement at the prevailing date. To that end, Prudential submitted that after they sought and obtained Bank Negara's approval in principle, the agreement was saved from being an illegal agreement as they had sought the approval from the correct authority and complied with the relevant law in force at the time of seeking approval, which was the FSA 2013. On the other hand, Detik Ria submitted that since s 272(l) of the FSA 2013 expressly stated that this law would not apply retrospectively and that any obligation under the Acts repealed by the FSA 2013 would remain in force under the new law, it was the Minister of Finance's approval that had to be obtained. Prudential had not done so to date.

[26] Learned counsel for Detik Ria prepared a chart setting out the chronology of major events against the timelines of the applicable law, which was of considerable use. We reproduce a part of it below with slight amendments relating to the placement of the dates:

Date	27 February 2002	15 December 2008	2009 onwards	April 2018	May 2018	18 August 2023
Conduct	Conditional call/put option agreement (for 49% local shareholding)	Exercise of put option	Substantial part payment and de facto control	Application to Bank Negara for approval to complete the 2002 agreement	Approval in principle from Bank Negara	Confirmation of no prior approval f rom the Minister of Finance
By	Prudential UK and Detik Ria	Detik Ria	Prudential UK	Prudential UK	Bank Negara	Ministry of Finance
Law in force	INSURANCE ACT 1996			FINANCIAL SERVICES ACT 2013		

[27] Nearly ten years after Detik Ria issued a notice to exercise the put option and received part payment of the purchase price, Detik Ria wrote a letter dated 30 April 2018 to Prudential Corp Asia (the regional head office in Asia for the Prudential plc group of companies) stating that it sought to rescind the exercise of the put option and maintain its 49% shareholding in SHS.

[28] It offered to refund the total amount of payments received plus a reasonable rate of interest. The reason Detik Ria sought to rescind the put option agreement was the non-completion of the divestment of its 49% shareholding in SHS to Prudential. What was not stated, but becomes apparent in the course of our judgment, is that the divestment could not, in law, be completed due to the failure to obtain regulatory approval, particularly from the Minister of Finance, for the transaction.

[29] Prudential Corp Asia replied in a letter dated 16 May 2018, stating its position that the put option exercise was valid, irrevocable, with no grounds for its rescission, and that Prudential intended to complete the acquisition of the option shares once the requisite regulatory approvals were obtained. Detik Ria did not respond to this letter.

[30] There is in evidence a letter dated 24 September 2018 from Bank Negara to a director of Prudential Corp Asia. It referred to proposals for Prudential to dispose of its 'effective interest in excess of 70%' in PAMB. Detik

Ria's counsel submitted that this letter showed that Prudential was conducting itself as if Prudential Assurance's acquisition of the subject shares had already taken place. Before the acquisition of Detik Ria's shareholding, Prudential Assurance only owned a 51% stake. Therefore, Prudential could only claim to have an interest in excess of 70%, if it took into account the complete acquisition of Detik Ria's shareholding. By stipulating that it had an effective interest in excess of 70%, Prudential effectively conducted itself as the owner of Detik Ria's shareholding.

[31] Well prior to this, Prudential had been trying to obtain Bank Negara's approval for the put option exercise. The correspondence/documents/applications evidencing Prudential's efforts are not in evidence before the court. However, Bank Negara's letter dated 10 June 2019 to the director of Prudential Corp Asia and the director of Detik Ria referenced an application from Prudential Corp to acquire Detik Ria's 49% effective interest in shares in PAMB, which Bank Negara received in April 2018.

[32] This letter also recorded the following events after receipt of the April 2018 application:

(a) based on the representations made in the said April 2018 application, Bank Negara conveyed its approval in principle to Prudential Corp in May 2018;

(b) vide letter dated June 2019, Bank Negara stated that it had no objection to Prudential's application to complete the acquisition of Detik Ria's 49% interest in SHS with immediate effect;

(c) however, there was no mention of the consent of the Minister which was essential for compliance with the law. Therefore, as of this date, there was no approval from the Minister of Finance fo r the acquisition under the CPOA. However, Prudential's position is that under the FSA 2013, only Bank Negara approval is required; and

(d) in June 2018, Detik Ria wrote to inform Bank Negara that it intended to maintain its 49% shareholding in SHS and was in discussion with Prudential Corp in relation to this.

[33] In view of the above events, Bank Negara recommended that both Detik Ria and Prudential Corp resolve matters expediently and update Bank Negara of the outcome by 1 July 2019. However, a solution was not reached by the stipulated date.

[34] Prudential Corp Asia issued a letter dated 22 July 2019 to Detik Ria enclosing the necessary documents to complete the first plaintiff's (Prudential

Corp's) acquisition of the option shares. Detik Ria replied on the same date, stating that the methodology for computation of the put option price was misleading and unreasonable and it would not complete the transfer of the 49% equity interest in SHS.

[35] Nevertheless, Detik Ria accepted the part payment of RM5,684,396 on 26 July 2019. Prudential's counsel highlighted this as evidencing the inconsistent stance of Detik Ria which on the one hand purported to rescind the put option exercise but continued to receive benefits from the CPOA.

[36] On 16 September 2019, Prudential Assurance assigned all of its rights and benefits under the various agreements to Prudential Corp, its related company Prudential Corp Holdings Ltd, by way of a deed of assignment dated 16 September 2019 pursuant to cl 11 of the CPOA.

[37] On 18 September 2019, Prudential filed this originating summons against Detik Ria and the late Tan Sri Datuk Abdul Rahim to seek recognition of the arrangement between the parties. The defendants in turn counterclaimed against Prudential for restitution. They sought, among others, a declaration that the CPOA and the supplements thereto are illegal and unenforceable and that Prudential is to pay Detik Ria RM2.2 billion plus, being 49% of the shareholding dividends declared by SHS from 2009 to 2019, as well as interests, costs and other reliefs appropriate.

[38] The defendants opposed this originating summons on the basis that if the transfer of the SHS shares were allowed, Prudential Corp would own 99,999 ordinary shares in SHS, equating to 99.999% ownership in PAMB, with the result that PAMB would be 100% foreign-owned. This could not be legally done without the Minister of Finance's prior approval.

[39] Prudential claimed that real reason behind the sudden u-turn and rescission of the put option exercise was the rejection of Detik Ria's bid to buy a 30% stake in the local insurance industry. When the put option was exercised, Prudential would become 99% owner of PAMB and would have to divest 70% of those shares to domestic investors pursuant to Bank Negara's policy stated in its letter dated 24 September 2018.

[40] The policy was: 'the goal of delivering a wealth-sharing mechanism with Malaysians that will deliver meaningful and sustained long-term economic benefits to Malaysia, through the broader participation of Malaysians in the insurance sector and greater access to insurance coverage for all segments of society ...'. In 2018, Detik Ria made inquiries with Prudential on whether the former could purchase a 30% of those shares as it found out that Prudential was intending to sell that stake to the Malaysian Pensions Fund

A ('KWAP'). However, when Prudential did not agree to do so, Detik Ria rescinded the put option.

[41] On 28 April 2023 and 17 August 2023, Detik Ria wrote to the Ministry of Finance to inquire as to whether the Minister had granted prior written approval for the acquisition of its 49% effective interest in PAMB based on the 2002 agreement. The Ministry of Finance replied by way of a letter dated 18 August 2023, confirming that it had no records of granting prior written approval 'yang merupakan syarat duluaan' (which is a condition precedent) to Prudential Assurance for the said acquisition.

[42] The High Court upheld the CPOA as the learned High Court judge found that it was not illegal. That being the case, the issue of restitution under s 66 of the Contracts Act 1950 did not arise and parties were bound to honour their obligations under the CPOA. The High Court so held because the CPOA was a conditional contract where the obligations of the parties would only be legally enforceable upon obtaining approval from Bank Negara. As alluded to earlier, the courts below appear to have equated approval from Bank Negara with that from the Minister of Finance notwithstanding their finding that the applicable law was the Insurance Act 1996.

[43] The learned High Court judge also dismissed the contention by Prudential that parties were labouring under a mutual mistake because it was contradicted by the conduct of both parties to extend the time frame and to enter into the various commitments that followed. Besides, Detik Ria never complained or objected when Prudential made part payments to it under the agreed formula. His Lordship firmly held that Detik Ria was estopped from taking such a position at this stage.

[44] Detik Ria appealed against this. The Court of Appeal unanimously affirmed the High Court decision. The Court of Appeal agreed that the applicable law was the Insurance Act 1996. Taking a purposive approach, the Court of Appeal held that the legislative intent behind the enactment of s 67 of the Insurance Act 1996 is that approval from Bank Negara must be obtained if the agreement entered into will lead to the acquisition or disposal of the share. The Court of Appeal found that Bank Negara's letter did in fact amount to the requisite approval. As stated above, the courts below appear to have equated the approval of Bank Negara with the approval of the Minister of Finance despite finding that the applicable law was the Insurance Act 1996.

[45] The Court of Appeal took the view that a construction of s 68 which empowers Bank Negara to take steps when where is a contravention of s 67 shows that the offence committed under s 67 relates to the acquisition or disposal of the shares, not *proposed* acquisition or disposal of the shares.

Therefore, the execution of or entry into a contingent contract such as the CPOA was not prohibited. The issue of any contingent contracts being rendered void did not arise so long as the acquisition or disposal did not take place until the fulfilment of the conditions.

[46] Thus, the Court of Appeal held that the prohibition in law is not against the entering into of a contract, but the carrying out of the contact which would lead to the acquisition or disposal of more than 5% shares without the prior approval of Bank Negara. Therefore, the 'prior written approval' did not need to be obtained when the CPOA was entered into, and the CPOA was valid even though approval was not obtained prior to its execution. The Court of Appeal held that the CPOA was not illegal or void or invalid.

[47] It is apparent from the decisions of the courts below that their focus was centred entirely on whether the failure to obtain Bank Negara's approval *prior to* entry into the CPOA and SCPOA was illegal or otherwise and the consequences on the agreements (this remained their focus despite their finding that it was the provisions of the Insurance Act 1996 that prevailed and not the FSA 2013, which therefore required the Minister of Finance's approval prior to performance).

[48] In view of the fact that the primary focus was on conditions precedent, there was no consideration of the conduct of parties in relation to performance of the CPOA, over the course of the years from 2002 to 2018 in relation to the status and control of the 49% Detik Ria shareholding in SHS, particularly after the SCPOA, and the effect of such status and control on the agreement in terms of performance, given that there was no consent from the Minister of Finance when these material events occurred.

[49] Detik Ria applied for leave to appeal to the Federal Court, and leave was granted on the following questions of law:

THE QUESTIONS OF LAW

(1) whether, understood in context, the phrase 'enter into an agreement or arrangement' in s 67(1) and (2) of the Insurance Act 1996 is to be interpreted as applying to contingent contracts within the meaning of ss 32 and 33(a) of the Contracts Act 1950 such that prior approval of the Minister is a legal prerequisite to enter into such a contract;

(2) with respect to applications for the approval of the relevant regulatory authority under s 67(3) of the Insurance Act 1996, whether the word 'approval' is to be interpreted as requiring an unconditional and unequivocal approval of the regulatory authority;

(3) whether the 2002 agreement between the respondents and the first applicant relating to the sale and purchase of shares representing 49% of the share capital of a licensed insurer is unlawful, void and unenforceable pursuant to s 24 of the Contracts Act because it was entered into without the prior written approval of the Minister of Finance, contrary to s 67 of the Insurance Act 1996;

(4) whether the decisions in:

(i) *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 in holding that a sale and purchase agreement for shares in a bank is unlawful, void and unenforceable for breach of statutory provisions identical to s 67 of the Insurance Act 1996; and

(ii) *Aun Huat v Sime Darby Bhd* [2003] 6 MLJ 49 in holding that Bank Negara acted ultra vires in purporting to withdraw a prior written approval by the Minister of Finance to buy shares in a bank under statutory provisions identical to s 67 of the Insurance Act 1996.

(5) should be followed in the instant appeal so that there is harmony in our laws governing the banking and insurance industries; and

(6) if the 2002 agreement is declared unlawful, void; and unenforceable, whether restitution should be ordered pursuant to s 66 of the Contracts Act 1950, and, if so, how should the contracting parties be restored to their positions prior to the execution of the said agreement.

[50] We heard the appeal on 27 March 2024 and adjourned for further submissions to continue on 30 July. After parties concluded their oral submissions on the second hearing date, we allowed Detik Ria's appeal, delivering a short ex tempore judgment. The grounds are as follows:

Ex tempore judgment

(1) the pivotal issue in this appeal turns on whether the agreements in issue can be specifically performed or in other words enforced. This is because s 67 of the Insurance Act 1996 requires that the approval of the Minister be obtained prior to entry into and the carrying out of the said agreements. It is not in dispute that no such approval was ever obtained from the Minister of Finance;

(2) on the issue of whether there is a contravention of s 67 we are of the unanimous view that:

(a) there was no contravention of s 67 when the CPOA was entered into in 2002 as the agreement specifically provides for the approval

of the Minister to be obtained as a condition precedent prior to the agreement being put into effect;

(b) however, we find that there is a contravention of s 67 of the Insurance Act 1996 in that the agreement was carried into effect without the approval of the Minister of Finance. In other words, the agreements were not void ab initio, but became void and unenforceable when the approval of the Minister was not obtained;

(c) in this context we are not persuaded that it is the Financial Services Act 2013 that is the relevant legislation by reason of s 272(l) of that Act, which expressly preserves obligations that were incurred under the repealed Insurance Act 1996. Accordingly, the consent of the Minister is mandatory before any such agreement can be performed;

(d) having heard the parties and read the appeal records, we conclude that the agreement was substantially performed for the following reasons:

(i) payment of RM109m which comprises 99.5% of the full purchase price was effected;

(ii) Detik Ria is prohibited from dealing with the option shares;

(iii) the admission by Prudential that the option shares were held in trust by Detik for the benefit of Prudential;

(iv) the letter dated 24 September 2018 from Bank Negara to Prudential whereby Prudential held out to Bank Negara that Prudential had shares in excess of 70% in Prudential Assurance. That could only occur if they included part of the 49% belonging to Detik as belonging to themselves;

(v) the provisions in the memorandum of deposit required Detik to vote in such manner as may be directed by Prudential and so as not to prejudice the interests of Prudential; and

(vi) the acknowledgement that Prudential was entitled to sell the option shares at its behest.

(e) all these matters evidence the fact that the agreements were effectively performed in substance, save for the actual transfer of the shares. In the upshot those agreements are unenforceable and void for the reasons we have stated;

(f) the courts below erred in not considering and concluding that these matters amounted to carrying the agreements into effect, without the Minister of Finance's approval, contrary to s 67 of

A the Insurance Act 1996;

(g) they further erred in relying on Bank Negara approval when it is the approval of the Minister that is required;

(h) as we have found the agreements to be unenforceable and void, we B are of the unanimous view that s 66 of the Contracts Act 1950 applies. This means that the parties to the Agreements are to restore any advantage that they have received from each other.

(i) this in turn means that:

C (i) Detik Ria is to return the purchase price that has been paid thus far, namely RM109,205,290.57 together with interest at the rate of 5%pa from the date of the originating summons;

(ii) the respondents are similarly to restore all advantage/benefit that it D has received under the agreements including but not limited to dividends, if any, due to Detik Ria. Interest is similarly to run at 5% per annum from the date of the originating summons;

(iii) in the event of any dispute between the parties in relation to the advantage/benefit to be restored, the parties here are at liberty to E apply to the High Court; and

(iv) we therefore allow the appeal and set aside the orders of the courts below. Costs to the appellant here and below in the sum of RM200k subject to allocatur.

F

[51] We now provide our full grounds for allowing the appeal.

ANALYSIS

G **[52]** The crux of the appeal relates to the validity of the CPOA and the SCPOA given that the consent of the Minister of Finance, mandatorily required under s 67 of the Insurance Act 1967, was never procured. They are conditional contracts, and conditions precedent need to be met before the agreements can come into force or be performed. In the instant case it is the H consent of the Minister of Finance that is required. Prudential maintains that it is sufficient that the approval of Bank Negara be obtained as the relevant applicable legislation is the FSA 2013, and not the Insurance Act 1996, as the latter has been repealed. Detik Ria maintains that the savings provisions in the FSA 2013 still require the consent of the Minister to be obtained. The issue of I the relevant applicable legislation will be dealt with later on in the judgment. The first matter for consideration relates to the CPOA and SCPOA which fall into that class of contracts known as conditional contracts. In the context of conditional contracts, where a mandatory requirement under a statute must be obtained before entry into the contract, ie the CPOA and later the SCPOA,

does the lack of such consent on the execution or entry into the conditional contracts render them illegal and void ab initio?

[53] As explained earlier, Prudential maintains that the agreements, being conditional contracts subject to conditions precedent, do not become enforceable until the conditions are fulfilled. As such they maintain that the CPOA and the SCPOA will come into force and become enforceable only when the requisite conditions precedent are fulfilled. In this context it is argued that as Bank Negara acceded in principle as of June 2019, the agreements are valid, binding and enforceable. To that extent Prudential maintains that it is entitled to specific performance of the two agreements, and seeks a declaration to that effect in their originating summons together with other reliefs.

[54] Detik Ria maintains that specific performance ought not or cannot be granted because:

(a) the CPOA and the SCPOA are unlawful and void ab initio, because the entry into these agreements were effected *without the prior written approval* of the Minister of Finance and expressly prohibited under s 67 of the Insurance Act 1996. In this context s 67 of the Insurance Act 1996 provides:

> 67 Acquisition or disposal of aggregate of five percent interest in shares
>
> (1) No person shall enter into an agreement or arrangement to acquire or dispose of any interest in shares of a licensee incorporated in Malaysia or of its controller by which, if the agreement or arrangement is carried out, he would, either alone or with any associate, acquire or dispose of to a person, either alone or with any associate, together with any interest in shares of that licensee or of its controller already held by him or previously disposed of by him, as the case may be, an aggregate interest in shares exceeding five per cent of the shares of that licensee or of its controller without obtaining the prior written approval of the Minister, in the case of a licensed insurer, and the Bank, in the case of a licensed insurance broker, licensed adjuster or licensed financial adviser.
>
> (2) No person who has obtained an approval under subsection (1) or who holds more than five per cent of the shares of a licensee or of its controller, shall enter into a subsequent agreement or arrangement to acquire or dispose of any interest in shares of the licensee or of its controller without obtaining the prior written approval of the Minister or the Bank, as the case may be.
>
> (3) A person intending to acquire or dispose of any interest in shares of a licensee or of its controller under subsection (1) or (2) shall submit his application to the Bank, after which the Bank shall —
>
> > (a) in the case of a licensed insurer or of its controller, submit the application, together with its recommendation to the Minister who shall approve or refuse the application; and

A (b) in the case of all other licensees or their controllers, approve or refuse the application.

Penalty: Imprisonment for three years or three million ringgit or both. Default penalty.

B (b) put another way, it is Detik Ria's contention that as the parties agreed to something that was prohibited by statute, it was unenforceable by either party, and in point of fact void and illegal ab initio. Prudential, as stated above, maintained to the contrary.

C

[55] In the course of submissions during the first hearing, we posed a question to counsel for both parties. *We asked whether the agreements, namely the CPOA and the SCPOA, could become illegal during the course of performance, by reason of the non-fulfilment of the condition precedent. In other words, we sought* D *an answer as to whether these agreements could become illegal in the course of performance, by reason of their being performed substantially or in part, without the fulfilment of the condition precedent*. And what were the consequences of an illegality arising by reason of performance of the contract, ie the CPOA and the SCPOA?

E

[56] In response to our query Prudential maintained in substance, that apart from the payment of consideration, which was accepted by Detik Ria, the agreements were *not* performed. Therefore, there was no question of an illegality arising in the course of the 'performance' of the agreements, because F there was no substantial performance. Detik Ria contended to the contrary and pointed to the statutory requirement that even an 'acquisition of an interest in shares' could not be effected or achieved, without prior regulatory approval under the relevant statute ie s 67 of the Insurance Act 1996 (see the Federal Court decision in *Five Star Heritage Sdn Bhd & Ors v Peguam Negara Malaysia and other appeals* [2023] MLJU 2726; [2024] 2 CLJ 167, which held that the G Attorney-General was not empowered to grant consent retrospectively).

[57] It maintained, in substance that performance had in fact been H effectively achieved by reason, inter alia, of Prudential's stance that the exercise of the option under the CPOA was irrevocable; the payment of 99.5% of the purchase price; the prohibition against Detik Ria dealing with the shares; and Prudential's concession that the option shares were held in trust by Detik Ria for the benefit of Prudential.

I

[58] To our minds the appeal turned on this important matter.

ISSUES

[59] In order to arrive at a decision, the following issues arose for our consideration:

(a) what is the relevant legislation applicable — s 67 of the Insurance Act or the provisions of the Financial Services Act 2013?

(b) how is s 67 of the Insurance Act 1996 to be construed and what is the effect of a contravention of the same, ie if there is a failure to obtain the Minister of Finance's consent?

(c) is the entry into the agreements, namely the CPOA and subsequently the SCPOA, which contains a condition precedent that the requisite mandatory approvals be obtained prior to performance of the contract, illegal?

(d) does it render the CPOA an illegal contract ab initio?

(e) if an illegality arises in the course of the performance of an agreement what are the consequences in law?

(f) as a matter of fact, was there performance or effective performance of the agreements by the parties, notwithstanding the lack of regulatory approval as required under the relevant statute?

(g) what were the consequences on the CPOA and the SCPOA, of these agreements being effectively or substantially performed, without the fulfilment of the condition precedent? In other words, what was the effect of the conduct of the parties, putting into effect material parts of these agreements over the years after entry into the CPOA and SCPOA, notwithstanding that the condition precedent had not been fulfilled?

(h) did the CPOA and the SCPOA remain specifically enforceable or become void such that specific performance is unavailable?

(i) if the contracts become void, is s 66 of the Contracts Act applicable to determine the remedies available to the parties?

[60] We now consider these issues in turn.

Issue (a): What is the relevant legislation that applies f or the purposes of this dispute — the Insurance Act 1996 or the Financial Services Act 2013?

[61] Detik Ria contended that the law applicable to the agreement was the Insurance Act 1996 as it was the law in force at the time of the entry into the CPOA. Therefore, the CPOA, it was contended, was void ab initio as it was entered into without obtaining prior approval from the Minister of Finance as required under s 67(1) of the Insurance Act 1996.

[62] Prudential does not dispute that the Insurance Act 1996 was in force at the time of entry into the CPOA, but took the stance that the agreement was not performed when the Insurance Act 1996 was in force. Prudential argued that as the transfer of the subject shares had not been effected, the CPOA had not been performed. To determine the applicable law, Prudential argued that the court should consider the time when Prudential applied to Bank Negara for approval for the transaction in 2018 as the relevant time for ascertainment of the applicability of the relevant statute. At that time the FSA 2013 was in force. Section 87(1) of the FSA 2013 requires the prior written approval of Bank Negara instead of that of the Minister of Finance, for the transaction. Section 87(1) provides:

> 87 Acquisition of interest in shares requiring approval
>
> (1) Subject to section 92 and except with the prior written approval of the Bank, no person —
>
> (a) shall enter into an agreement or arrangement, to acquire any interest in shares of a licensed person by which, if the agreement or arrangement is carried out, he would hold (together with any interest in shares of that licensed person which are already held by such person) an aggregate interest of five per cent or more in the shares of the licensed person; or
>
> (b) who has obtained an approval of the Bank under paragraph 90(3)(a), or the Minister under subsection 90(6) in respect of the prohibition under subsection (2), as the case may be, shall enter into any subsequent agreement or arrangement, by which, if the agreement or arrangement is carried out, he would hold an aggregate interest in shares of a licensed person of, or exceeding —
>
> (i) any multiple of five per cent;
>
> (ii) or the percentage holding for a mandatory offer under the Malaysian Code on Take-Overs and Mergers prescribed under section 217 of the Capital Markets and Services Act 2007.
>
> (2) Notwithstanding subsection (1), no person shall enter into an agreement or arrangement to acquire any interest in shares of a licensed person by which, if the agreement or arrangement is carried out, he would hold (together with any interest in shares of that licensed person which are already held by such person) an aggregate of more than fifty per cen t of the interest in shares of the licensed person, without obtaining the prior written approval of the Minister, on the recommendation of the Bank.
>
> (3) For the avoidance of doubt, a person shall not be required to obtain —
>
> (a) the approval of the Bank —
>
> (i) under subsection (1), for any subsequent acquisition of interests in the shares of a licensed person, if —
>
> (A) such person has already obtained the approval of the Bank under that subsection; and
>
> (B) such acquisition will result in the person holding interest in

shares which is less than any multiple of five per cent;

(ii) or under subparagraph (1)(b)(i), if the approval of the Minister under subsection (2) is also required for such acquisition; or

(iii) the approval of the Minister under subsection (2) for any subsequent acquisition of interests in the shares of a licensed person if such person has already obtained the approval of the Minister under subsection 90(6) to hold an aggregate of more than fifty percent of interest in shares of the licensed person.

(b) the approval of the Minister under subsection (2) for any subsequent acquisition of interests in the shares of a licensed person if such person has already obtained the approval of the Minister under subsection 90(6) to hold an aggregate of more than fifty percent of interest in shares of the licensed person.

...

[63] Prudential therefore contended that it was correct in seeking Bank Negara's approval and since Bank Negara had granted its approval in principle, the CPOA is valid and did not contravene the law. It further maintained that it is the applicable law which exists at the date of the hearing which is relevant and not such law which exists when the agreements were executed. For this, reliance was placed on, inter alia, *Che Esah & Anor v Che Limah* [1966] 1 MLJ 36; [1965] 1 LNS 21 (FC) and *Quilter v Mapleson* (1882) 9 QBD 672. Therefore s 67 was not applicable to the matter as it had been repealed long before the originating summons was filed.

[64] Finally, it was contended that the approval of Bank Negara is no longer required for the acquisition of the 49% shares in SHS as SHS is not a licensed person but was a controller of the licensee which is Prudential Assurance Malaysia Bhd. Therefore, Detik Ria's contention that s 67 remains applicable is misconceived. Prudential also pointed to s 270 of the FSA 2013 which provides that no agreement is to be rendered void solely on the basis of any contravention of the provisions of the Act unless so expressly provided.

[65] In response to this submission, Detik Ria relied on s 272(l) of the FSA 2013 which expressly states that this law would not apply retrospectively and that any obligation under the Acts repealed by the FSA 2013 would remain in force under the new law. Therefore, Detik Ria argued that it was the Minister of Finance's consent that had to be obtained, not Bank Negara's approval. Prudential had not sought to obtain such consent to date, as confirmed by the Ministry of Finance's letter dated 18 August 2023.

[66] Section 272 of the FSA 2013 provides:

272 Notwithstanding section 271

A (a) ...

(b) ...

(c) ... Any application for a licence, approval, authorisation, notification, acknowledgement, consent, permission or for any other purpose whatsoever made by any person under the repealed Acts before the appointed date and pending before the appointed date, shall:

B

(i) If there is a corresponding provision in this Act or in any direction issued under subsection 214(6) or 216, be dealt with in accordance with such provision; and

C

(ii) if a different provision has been made for the application under this Act or in any direction issued under subsection 214(6) or 216, be dealt with in accordance with such provision; and

(iii) ...

D (i) Any right, benefit, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts, shall cont inue to remain in force under this Act; and ...

[67] Having considered the parties' respective contentions, we were not persuaded by Prudential's legal argument on this point. We can do no better than to adopt the conclusions on this point by the Court of Appeal which reasoned as follows:

E

(a) first, para (c) did not apply to the approval sought from Bank Negara because such application for approval was only made in April 2018 after the Act had come into force on 30 June 2013. There was therefore no 'pending application'. It was therefore para (l) which was applicable and which preserved the right, benefit, privilege, obligation or liability acquired, accrued or incurred under the repealed Acts that applied to the present appeal;

F

G (b) second, we concur that there is no express provision making these provisions of the FSA 2013 retrospective in effect. As such there was no reason to seek to apply it retrospectively (see *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd & Other Appeals* [2020] 1 MLJ 311 at p 338; [2020] 1 CLJ 193 (FC));

H

(c) in these circumstances by reason of s 272(l) of the FSA 2013, the relevant applicable statutory provision is s 67 of the Insurance Act 1996 that prevails and is applicable. It is a well-established principle that the rights and obligations of parties to an agreement are to be decided by the prevailing statutory regime at the time of entry into the said agreement. In the case of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, Raja Azlan Shah FCJ held in relation to a constitutional amendment:

I

In so far as an Act of Parliament is concerned, the rule of construction is that

> in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament ....
>
> The principle that parties are to be governed by the law in force on the date when an action is instituted and any subsequent amendment or alteration cannot affect vested right or pending proceeding, must always be read subject to the corollary that Parliament can always expressly provide that vested right or pending proceeding be affected by the amendment of the law.
>
> If Parliament retrospectively affects vested right or pending proceeding, then it would be the duty of an appellate court to apply the law prevaliding on the date of appeal before it ...

In this case, since Parliament has expressly provided in s 272(l) of the Financial Services Act 2013 that the FSA 2013 was not retrospective in nature, parties would be governed by the Insurance Act 1996 which was the law in force at the time of entry into the CPOA;
We also find that the parties were governed by the Insurance Act 1996 for the reason that at the time of entry into the agreement, parties only had knowledge of the Insurance Act 1996 as the law binding upon them. It was not possible for the parties to have foreseen that s 87(1) of the FSA 2013 would come into force and supersede the previous requirement under s 67(1) of the Insurance Act 1996; and

(d) to that end it was mandatory for Prudential to obtain the consent of the Minister of Finance before the agreement was performed or carried out. (However, this did not preclude the entry into a conditional contract as was done under the CPOA in 2002, as will be discussed below.)

[68] Therefore, we agree with the courts below that the applicable law is the Insurance Act 1996 and that the prior written approval of the Minister of Finance was indeed a statutory requirement for the shares transaction envisaged in the CPOA.

Issue (b): How is s 67 of the Insurance Act 1996 to be construed and what is the effect of a contravention of the same, ie if there is a failure to obtain the Minister of Finance's consent?

[69] In determining whether the CPOA was illegal for being in contravention of the law and therefore null and void, the question which arises is — was the CPOA prohibited by the applicable statutory regime, ie the Insurance Act 1996? It is incontrovertible that the Minister of Finance did not grant approval before the CPOA was entered into or executed, which was a statutory requirement under s 67 of the Insurance Act 1996. The provision

envisages the consent of the Minister of Finance being obtained prior to entry into an agreement to acquire or dispose of shares exceeding 5% in an insurer.

[70] However, the express terms of the CPOA provide as a condition precedent to the coming into force of the agreement, that the consent of the Minister is to be obtained. This meant that until the consent of the Minister of Finance was obtained the agreement would not come into being or existence. The condition precedent effectively provides that there would be no agreement for the disposal or acquisition of shares in existence until such consent was obtained. The necessity to obtain the consent of the Minister under s 67 of the Insurance Act 1996 was recognised and given effect in that it was evident that the contract could not be performed or effected without such express consent.

[71] Detik Ria maintained (at the outset) that the clear and unambiguous meaning that ought to be accorded to s 67 of the Insurance Act 1996 was that very entry into or execution of an agreement relating to a disposal of anything more than 5% of the shareholding of a licensed insurer could not be undertaken without obtaining the consent of the Minister of Finance first. Prudential contended otherwise, maintaining that the effect of the condition precedent expressly stipulated throughout the CPOA was for the consent of the Minister (or requisite regulatory authority/consent) to be obtained before the agreement could come into effect. Without it, the contract did not even come into effect and to that extent there was no contract in existence that was capable of being performed. It would only take effect upon the approval being obtained. Both the courts below agreed with this latter interpretation.

The first question that then arises is *how s 67 of the Insurance Act is to be construed. Literally or purposively?*

Literal approach or statutory purposive approach to interpretation

[72] When interpreting legislation, the courts should employ the statutory purposive approach to discern the purpose and object of the legislation pursuant to s 17A of the Interpretation Acts 1948 and 1967. Section 17A gives statutory recognition to the purposive approach such that the courts should adopt a construction which would promote the general legislative purpose underlying the relevant provision (see *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11; [2002] 2 CLJ 57).

[73] Previously the approach adopted by the courts was to adopt the English common law approach of utilising the literal construction first, and only if an ambiguity arose, would the courts turn to the purposive approach. Further a literal approach was applied as amounting to a reference to solely the precise text of the phrase or sentence or section in issue. Such an approach is not, with

the greatest respect, the ideal mode of construction to be adopted. First, in light of the existence of s 17A of the Interpretation Acts 1948 and 1976, the statute-prescribed approach necessarily outflanks the common law approach, as a matter of law. And s 17A prescribes an approach that takes into account the purpose and object of the law in construing the text in issue. Therefore, all construction should take into account the purpose and object of the legislation in question. This in turn means adopting a construction that is holistic in that it interprets not only the section in issue but also how the section interacts with the rest of the legislation. Ultimately the construction to be adopted should resonate with the purpose and objective of the legislation and harmoniously so with the rest of the statute, in principle.

[74] Second, a literal approach in itself does not prescribe reading the exact words and applying them without taking into account the rest of the section or the legislation as a whole. In short even a literal approach envisages taking into consideration the context in which the subject words are utilised, such that the ultimate interpretation is consonant with the section or legislation and not repugnant to it. A grammarian approach is not to be adopted.

[75] In *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657 it was explained that law should be read contextually and not literally or solely premised on the text alone. In the case of *Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors and other appeals* [2024] 3 MLJ 223; [2024] 5 CLJ 193 ('Concrete Parade'), the court stated that it is necessary to determine the underlying intent and purpose of the section which is consonant with an Act as a whole in order to arrive at a legally coherent and correct construction of the provisions under study. The Federal Court in *Concrete Parade* also stated that this may be achieved by studying the legislative history of the section.

[76] We therefore considered the legislative history of s 67 of the Insurance Act 1996. The explanatory statement to the Insurance Bill DR 10/1996 states as follows:

> 7 Part VI deals with the management of licensees.
>
> Clause 66 ...
>
> *Clause 67 makes it necessary to secure the approval of the Minister (for a licensed insurer) or Bank (for a licensed insurance broker and a licensed adjuster) before acquiring or disposing of shares leading to an aggregate shareholding of more than five per cent in the licensee or in its controller.*
>
> Subclause 67 (2) ...
>
> Clause 68 empowers the Bank to make a preliminary order in writing or restrict any person contravening clause 67 from dealing with the shares.

The Bank Negara Malaysia statement dated 23.01.1997 titled 'Insurance Act 1996 and the Insurance Regulations 1996' gave further background on the purpose of section 67 of the Insurance Act 1996:

> BNM seeks to prevent the dishonest, the incompetent and the inexperienced from occupying positions of power and influence in the licensee. In this respect, the Act makes it necessary for a person to secure the approval of the Minister of Finance (in the case of an insurer) or BNM (in the case of an insurance broker or adjuster) if he wishes to enter into an agreement or arrangement to acquire or dispose of any interest in the shares of the respective licensees or their controllers i f the acquisition or disposal in aggregate exceeds five per cent of the shares of the licensee or of its controller. Previously this requirement was imposed administratively. (Emphasis added.)

[77] From the explanatory statement, the intention of the drafters appears to have been to prevent the acquisition or disposal of shares exceeding 5% of the shareholding of an insurance licensee or its controller taking place withou t the Minister's approval.

[78] This is also because of s 68 of the Insurance Act 1996, which was cl 68 of the Insurance Bill DR 10/1996, which in turn provided for Bank Negara to prevent any person contravening cl 67 (s 67) from dealing with the shares. The contravention of s 67 of the Insurance Act 1996 would only occur when the shares are dealt with. In this case, no such order was made and no such restriction under s 68 was imposed when the CPOA was entered into.

[79] We conclude that s 67 of the Insurance Act 1996 was enacted with the aim and purpose of prohibiting the performance of an agreement for a dealing in shares in an insurer in excess of 5% without the consent of the Minister of Finance. Doing so would be against the purpose and object of the legislation, which was to ensure government oversight of the disposal of shares in insurance companies.

[80] The purpose of the legislation is to ensure that the Minister of Finance is not only aware of the identity of the shareholders and how shares are dealt with but that he expressly consents to particular shareholders acquiring shares in a licensed insurer. This in turn is of primary importance as the insurer provides coverage for a large part of the population of the nation in respect of various activities and matters. It is imperative that the shareholders of the insurer who effectively therefore control the insurer are honest, credible and are sufficiently financed to meet the requirements of the industry. The immense problems that arise from under-funded insurers or dishonest insurers who are unable to provide cover for claims give rise to immeasurable harm and injury to large proportions of the population. It is therefore imperative that the Minister of Finance is appraised of the ownership or dealing in shareholding of an

insurer. It goes to the issue of national interest, security and well-being of the population. Another issue of relevance would be for the Minister to be aware and approve of the acquisition of shareholding by foreign companies and entities again in relation to the growth of the industry in the nation and the control of the insurer by non-nationals.

[81] The CPOA and the SCPOA effectively transfer control from the 49% local shareholder substantially to Prudential which is a foreign entity. It would mean that the insurer was effectively controlled by SHS which in turn is owned by Prudential. The approval and consent of the Minister to this significant alteration in the substantial shareholding of the insurer is crucial to the interests of the nation as evidenced by the legislation.

Issue (c): Is the entry in to the agreements, namely the CPOA, which contains a condition precedent that the requisite mandatory approvals be obtained prior to performance of the contract, illegal?

[82] *From our reasoning and conclusions above, we conclude that s 67 does not support the contention that the entry into an agreement for such acquisition or disposal of shares on condition that the Minister's approval be procured, is prohibited.*

[83] Clause 2.1 of the CPOA contains a condition precedent to the effect that the consent of the Minister is to be obtained. This clause contains a condition that affects the very formation or existence of the contract. The contract only comes into existence under the said clause when the requisite consent is obtained. This is to be contrasted with a condition which relates to the performance of a term of a contract. Clause 2.1 falls into the former and not the latter category. It provides as follows:

> 2.1 The obligations of the Parties hereto under this Agreement shall be conditional upon the approval of FIC, the Minister of Finance, BNM and any other relevant regulatory authorities in Malaysia to the grant of the options and the sale of the Option Shares and the Option Preference Shares or the PAMB Shares, as applicable, hereunder being obtained.

[84] It follows that the CPOA *when entered into* did not involve any actual 'dealing' in the subject shares of Detik Ria in SHS. There was no transfer, sale, acquisition or disposal envisaged or sought to be effected, until the requisite approvals and consents, including that of the Minister of Finance under s 67 had been obtained. As the contract for the actual dealing in shares could not come into existence until the condition precedent was satisfied, there could not be, and there was, in effect, no effective dealing in the shares.

[85] The 'entry into an agreement' as expressly stipulated in the legislation

envisages an agreement where a dealing with the shares is *effected or performed* — namely a disposal or acquisition of 5% or more. In the instant case a disposal of 49% was only envisaged upon compliance with the legislation, so it cannot be said that the agreement has the effect of transferring either an interest in the shareholding or an actual transfer of such shareholding.

[86] The entry into the CPOA in itself, did not therefore amount to a disposal or acquisition by either Prudential or Detik Ria in more than 5% of the shareholding of SHS. The condition precedent in cl 2.1 of the CPOA precluded it from amounting to such an acquisition or disposal, in that it was made subject to securing the requisite consent from the Minister of Finance. The parties cannot therefore be said to have entered into the CPOA with an intention to contravene s 67 of the Insurance Act 1996. The CPOA was not contemplated to be for an illegal purpose by either or both of the parties as the existence of the express condition precedent evidences the fact that both Prudential and Detik Ria fully intended to comply with the law.

[87] To hold otherwise would not only be contrary to the purpose and object specified in the legislation but would also preclude numerous ordinary transactions in the corporate world from proceeding without the requisite approvals. The requirement for regulatory approvals is both an important and routine requirement in numerous corporate transactions undertaken on a daily basis in the course of business in this jurisdiction. The requirement for consent or approval of a regulatory authority is commonplace. The practical reality is that if parties to a corporate transaction cannot even enter into a conditional contract which sets down the content, object and purpose of the transaction which is intended to be performed or to take place only upon full regulatory approval being obtained, then business and corporations would be adversely affected. This is because the obtaining of regulatory approval is a lengthy process and by the time such approval is obtained, the parties may well have changed their minds, other parties might intervene to preclude the transaction from proceeding, etc. Parties routinely enter into business transactions for multifold reasons in various fields and it is imperative that in order for this to flourish, parties should be and are at liberty to put down their intentions and objectives and reach agreement in principle timeously, while providing for the procurement of the requisite regulatory approvals. These agreements will *not* be able to take effect unless regulatory authority approval is obtained. Therefore, it is clear that in all these cases there is no intent at any stage to circumvent statutory and regulatory control and approval. That is the case in the present appeal too. Parties did not set out with the express purpose or objective of circumventing the need for regulatory approval from the Minister of Finance.

[88] In this vein, our courts have emphasised the need to be cautious before finding that a commercial agreement is void. If routine contracts are

immediately struck down on the basis of any statutory contravention, commercial dealings would be adversely affected. This is aptly pointed out by the Federal Court in *Maple Amalgamated Sdn Bhd & Anor v Bank Pertanian Malaysia Bhd* [2021] 6 MLJ 348:

> [82] Suffice to say, the law in this country has always recognised and more so now with the growing advent of commercial transactions, that the courts should move slowly to strike down agreements for illegality.

[89] And that is what the courts below ruled on in their judgments. It must be remembered that both courts dealt with the sole issue of whether conditional contracts, which contain condition precedents become 'illegal' for failure to obtain the requisite approvals, *prior to even entry into the contracts*. Given that conditional contracts do not come into force or existence until the condition precedent is fulfilled, it follows that entry into such a contract does not, per se, render the same illegal or void. These contracts do not contravene the intent and spirit of the law. The mischief that is sought to be countered is the acquisition or disposal of shareholding in an insurer without the knowledge and consent of the regulatory authorities, here the Minister of Finance.

Issue (d): Does the entry into the CPOA which contains a condition precedent but without the express consent of the Minister under s 67 of the Insurance Act, render the CPOA an illegal contract such that it is void ab initio?

[90] For the reasons stated above, the answer to this question is no. The CPOA on entry was a legal, valid, and binding contract between the parties, being a conditional contract with a condition precedent in cl 2.1 which precluded it from being performed until the requisite consent, inter alia, of the Minister under s 67 of the Insurance Act 1996 had been obtained.

[91] For completion we consider Detik Ria's submission that the CPOA is void ab initio by reason of s 24 of the Contracts Act 1950. Section 24(a) and (b) in particular were highlighted:

> 24 The consideration or object of an agreement is lawful, unless —
>
> (a) *it is forbidden by a law;*
>
> (b) *it is of such a nature that, if permitted, it would defeat any law; …*
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. *Every agreement of which the object or consideration is unlawful is void.*

[92] At the outset, it must be recalled that not every breach of a statutory prohibition falls within the ambit of s 24(a) and (b) of the Contracts Act 1950. If this were so, every breach of a statutory prohibition would result in a contract being void. It is accepted law that a statutory breach does not automatically

render a contract void; whether it does so depends primarily on the construction of the relevant statute. In this regard we rely on the Malaysian Supreme Court in *Beca (Malaysia) Sdn Bhd v Tan Choong Kuang & Anor* [1986] 1 MLJ 390 where the former Supreme Court said as follows:

> ... Not every breach of a statutory prohibition would render an agreement illegal or void though such breach may attract criminal penalty. The fundamental question is whether the Enactment means to prohibit the agreement. It is important that the courts should be slow to imply the statutory prohibition of agreements, and should do so only when the implication is clear. Whether an agreement is implicitly forbidden depends upon the construction of the statute, and for this purpose no one tests is decisive.

[93] This has most recently been reiterated by our apex court in *Tan Keen Keong @ Tan Kean Keong v Tan Eng Hong Paper & Stationery Sdn Bhd & Ors and other appeals* [2021] 3 MLJ 914 ('Tan Keen Keong') at [53]:

> [53] But, for now, there is also another critical factor which appears to have been overlooked by the learned judge, and that is *before striking down agreements, voiding arrangements or winding up corporations, the court must be satisfied that the illegality or the contraventions of law is related to or bear sufficient nexus to the activities or business of the company and/ or for which the company was incorporated. Not all breaches of statutory requirements resound in winding-up a company even if the breach attracts criminal sanctions; otherwise there will be chaos in commerce and business. This was cautioned by the Supreme Court in Beca (Malaysia) Sdn Bhd v Tan Choong Kuang & Anor* [1986] 1 MLJ 390; [1986] CLJ Rep 64 *that 'Not every breach of a statutory prohibition would render an agreement i llegal or void though such breach may attract criminal penalty'*.

[94] Section 24, when it speaks of an unlawful 'object', envisages situations where the purpose of the contract is to commit an illegal act or where the parties set out to circumvent the law. This is made clear, in relation to the identical provision from which our s 24 originates, by the Indian Supreme Court in *Gurmukh Singh v Amar Singh* (1991) 3 SCC 79:

> Section 23 of the Contract Act adumbrates that the consideration or object of an agreement is lawful unless it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provision of any law; or is fraudulent; or involved or implied injury to the persons or property of another; or the court regard it as immoral or opposed to public policy. In each of these cases, the consideration or object of an agreement is a said to be unlawful. Every agreement of which the object or consideration is unlawful is void. *The word object would mean the purpose and design which is the object of the contract, it is opposed to public policy which tends to defeat any provision of law or purpose of law, it becomes unlawful and thereby it is void under Section 23 of the Contract Act. Section 23 is concerned with only the object or consideration of the transaction and not the reasons or motive which prompted it*.

[95] As we have stated above there is no evidence of a n illegal object or purpose on the present facts. The parties entered into a commercial contract for the acquisition and sale of shares pursuant to a call and put option agreement. The notable issue of significance was that these were shares in an insurer as defined under the Insurance Act 1996, as we have alluded to earlier. As such it required specific statutory regulatory approvals, the most important of which was that of obtaining the consent of the Minister of Finance. They set out to perform this contract in full compliance with the relevant law and to obtain all the necessary approvals, including that of the Minister of Finance. Such an intention is clearly demonstrated by cl 2.1 of the original CPOA entered into in 2002.

[96] This is also evidenced by Prudential's efforts to obtain the approval of Bank Negara Malaysia, albeit this involved a span of 18 years in total, and at least nine years from the date when the SCPOA was entered into. However it is evident that there was no intention to hide the transaction from the relevant regulatory authorities.

[97] Indeed, what appeared to have taken place is that the parties at that time were under the misapprehension that only the approval of Bank Negara was required, notwithstanding the express provisions of the CPOA itself in cl 2.1. However, *cl 2.1 of the SCPOA made no reference to the regulatory approval of any regulatory authority other than Bank Negara*. While this does not oust the validity of *cl 2.1 of the original CPOA* providing for the Minister's approval, it does indicate that both parties had, at the forefront of their minds, the approval of Bank Negara.

[98] Proof of this misapprehension is further compounded by the fact that neither party, in either the High Court or the Court of Appeal, noted or brought up the alleged illegality of the Minister's lack of approval. The submissions of both parties in the lower courts focused solely on Bank Negara's approval. This goes to show that there was no intent or act on the part of either party to avoid obtaining the approval of the Minister of Finance. Therefore, it cannot be said that the contract had an unlawful 'object' such that it became void.

[99] Where there is a breach of statute in the course of the performance of an agreement, it cannot immediately be said that the 'illegality' arising as a result of such contravention automatically affects the core and substance of the transaction such that it taints all that it touches.

[100] It is imperative to consider holistically:

(a) the nature of the provision contravened in the context of the object and

A purpose of the statute; together with

(b) the transaction in question, the parties' intent and their act of contravention,

as a whole in order to ascertain whether the contravention is of such a nature as B to render the transaction illegal; or whether there is some other remedy/penalty afforded within the statute itself as the contravention did not have the effect of vitiating the contract in its entirety.

Issue (e): If an illegality arises in the course of the performance of an agreement what C *are the consequences in law?*

[101] We consider *issue (d)* which relates to the question we posed to counsel during the course of the first hearing, as we alluded to earlier.

D

[102] It is essentially a question of law, namely whether an illegality could arise in the course of the mode of performance of an agreement, here the CPOA, by reason of a contravention of a statute, here s 67 of the Insurance Act. If such an illegality arose, could the CPOA be specifically enforced by Prudential, the E party tasked with procuring such consent?

The position in law

[103] The starting point to address the issue of the validity or enforceability of F an agreement where an illegality arises by reason that the mode of performance adopted by the party performing it is in violation of a statute, is the well-known case of *St John Shipping Corporation v Joseph Rank Ltd* [1956] 3 All ER 683. It was a case where the plaintiff St John's Corp the shipowner, sought the recovery of monies owing on a contract of carriage, which was only part paid by the G defendant, J Rank. The latter held a bill of lading in respect of some of the ship's cargo. The vessel was to sail from the Alabama in the United States to Liverpool in the United Kingdom. While in the United States the charterers took on additional cargo which overloaded the vessel to the extent that her loadline submerged. This amounted to a contravention of ss 44 and 55 of the Merchant H Shipping (Safety and Load Line Conventions) Act 1932. The defendant refused to pay the balance of the sum due under the contract of carriage on the grounds that the plaintiff had contravened those provisions, and withheld some of the balance equal to the amount of cargo which had overloaded the ship. The plaintiff had in fact been prosecuted and fined for this. It was I incumbent on the court to determine whether the remaining freight for full delivery was due or not. In the course of determining this dispute, which was eventually determined in the plaintiff's favour, Devlin LJ set out the law *distinguishing between a contract which has as its object an illegal act and a contract whose performance involves an illegal act*.

[104] The judge referred first to the line of authorities that held that a party that performs a legal contract in an illegal manner cannot sue on it, beginning with the principle as set out by Atkin LJ in the case of *Anderson Ltd v Daniel* [1924] 1 KB 138 where it was held:

> ... The question of the illegality of a contract generally arises in connection with its formation, but it may a lso arise, as it does here, in connection with its performance. In the former case where parties have agreed to something which is prohibited by Act of Parliament it is indisputable that the contract is unenforceable by either party. And I think it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance by the party performing it is in violation of some statute, even though the contract as agreed between the parties was capable of being performed in a perfectly legal manner.

[105] Devlin LJ set out how this principle was to be comprehended:

> There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it ...

[106] This first principle is of particular relevance to the earlier issue arising, namely whether the CPOA was void ab initio. As applied, it shows that it was not the object of either Prudential or Detik Ria to commit an illegal act. This can be assessed from the terms of the contract. There is no evidence to suggest that there was mutual intent or any unilateral intent to break the law, more specifically s 67.

[107] However, that principle is not the issue at hand here. The issue is whether an 'illegal' performance of the contract can render the CPOA unenforceable or void. The answer is to be found in the second principle:

> The second principle is that a court will not enforce a *contract which is expressly or impliedly prohibited by statute*. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act that contract will be unenforceable. *In the latter class one has to consider not what acts the statute prohibits but what contracts it prohibits; but one is not concerned at all with the intent of parties; if the parties enter into a prohibited contract that contract is unenforceable*.
>
> The principle enunciated by Atkin LJ and cited previously is an offshoot of the second principle that a prohibited contract will not be enforced. If the prohibited contract is an express one, it falls directly within the principle. It must likewise fall within it if the contract is an implied one ...

[108] What is to be taken away from this case is that the illegal performance of a contract is not, or may not, in itself render the entire contract illegal, such that it is incapable of enforcement. And this is so because of the principle that contracts that are primarily valid and legal should be performed and given effect — a sacrosanct principle of contract law (see *Maple Amalgamated* (above) and *Co-operative Central Bank Ltd (in receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313; [1995] 4 CLJ 300 per Edgar Joseph FCJ):

[109] So, in *St John*'s, the contract was held to be valid and enforceable such that the defendant cargo owner was compelled to make the balance payment.

[110] However, it is the test laid out in respect of the second principle which is relevant. It stipulates that prohibited contracts ie contracts prohibited by statute, which are entered into, are unenforceable. It must follow that contracts which *become prohibited contracts by reason of performance or part performance are similarly unenforceable*. And that is obviously because on such performance, they fall within a category of contracts prohibited by statute.

[111] Here agreements for the disposal or acquisition of more than a 5% shareholding in the insurer without the permission of the Minister are void under the statute. While the CPOA was clearly not within the category of prohibited contracts when entered into in 2002, its status and content altered considerably both in 2009 and by 2018. Many parts of the CPOA which related to the operational functioning of SHS had changed by then. This was achieved by the bringing into effect of several parts of the CPOA. However, in all this time the Minister's consent was not obtained.

[112] Where performance of a contract is 'illegal' or 'in contravention of a statute' the result may be that contracts such as the CPOA which started of as legal, valid and binding contracts, end up, conclude or culminate in a category falling within the class of contracts prohibited by the statute. They become contracts that are prohibited by statute by reason of their performance in contravention of the statute. In the instant context in relation to s 67 of the Insurance Act 1996, this would refer to contracts where the disposal or acquisition of more than 5% of the shareholding of the insurer is performed, without the consent of the Minister.

[113] In such an instance, the contract contravenes an essential or core statutory requirement of the Insurance Act 1996, and may no longer be enforceable by the parties, or the party seeking to enforce the agreement unilaterally.

[114] Why would contracts which are legal by reason of the existence of a clear condition precedent become illegal at a later date? If the parties by their

subsequent conduct failed to abide, or effectively contravened the condition precedent by, for example, performing material or substantive parts of the contract, it is then open to question whether those contracts became contracts which fall into that class of contracts prohibited by the statute. This could arise where the Minister of Finance's consent was not obtained prior to performance of material parts of the CPOA and the SCPOA.

[115] The test to be applied is whether the contract is one which is prohibited by statute? In the instant case the question is whether the CPOA and the SCPOA became contracts falling within the category prohibited by statute by reason of their performance or substantive performance.

[116] In this context it is relevant to consider that a contract such as the CPOA and the SCPOA comprise bilateral contracts with obligations on either side to perform. '... Such a contract consists of an offer, acceptance and consideration. However, consideration is not ultimately the promise itself, but the performance promised. As performance is rendered, the contract becomes continuously more perfected until it is executed, on first one side and ultimately on both. As the contract progresses from inception to final execution, it is in a state which is described as 'executory' during which additional performance is necessary to reach an executed condition, but it is the contract itself as a whole that is in this state, and at any moment there exists in fact but one contract in various stages of development' (see article by Cornelius C Shields titled 'Illegal Performance of a Legal Contract' published in the Marquette Law Review 41, No 1 (Summer 1957): 34–47).

[117] If at the final executory or executed stage, the CPOA and SCPOA were effectively or substantially performed can it be said that the condition precedent applied and prevailed such that the contract was not even in existence?

[118] Applied to the facts of the instant appeal *the mixed question of fact and law that arises is whether the agreements remained legal, valid and enforceable as they were at the outset in 2002, or whether they became* unenforceable and void for contravention of a statute as of 2018?

[119] Therefore, the question to be posed and the test to be applied is whether between 2002 (when the CPOA was signed) and again between 2009 (when the SCPOA was signed) and 2018 (when the dispute arose and Detik Ria sought recission) the parties, in performing material parts of the CPOA and the SCPOA, caused these agreements to fall within the class of contracts that are prohibited under s 96 of the Insurance Act 1996?

[120] Put another way, did the CPOA and the SCPOA become contracts prohibited by statute by reason of the performance of the material parts of the CPOA and the SCPOA over a period of some nine or more years, which had the effect of propelling or shifting the agreements from conditional contracts which were legal, to contracts which fell into a class of contracts prohibited by statute?

[121] Prior to considering this issue, it is necessary to ascertain, as a matter of fact, whether there was performance or substantial performance of the CPOA and SCPOA. This comprises the subject matter of issue (f), which we address now.

Issue (f): As a matter of fact, was there performance or effective performance of the agreements by the parties, not with standing the lack of regulatory approval as required under the relevant statute?

[122] If there was no performance of the contract such that the condition precedent remained intact, such that there was neither an acquisition or disposal of the shares whatsoever, then the CPOA and the SCPOA would remain conditional or contingent contracts only coming into force after the Minister of Finance's consent was obtained. To that extent they would remain valid and enforceable.

[123] If there was performance or substantial performance such that the material parts of the contract were already in effect or achieved in relation to the acquisition and disposal of shares, then that would mean that the contract has already come into existence at least in part, by reason of an acquisition and disposal of an interest in the insurer in excess of 5%, but without the consent of the Minister of Finance, in contravention of s 67. The condition precedent would have been breached, and as such these contracts ought not to be specifically enforced.

[124] It should be borne in mind that this issue was highlighted by the court and parties were asked to submit on it specifically. To that end Prudential maintained robustly that there had been no performance of these contracts in part or otherwise as Prudential had not acquired the 49% shareholding of Detik Ria. The shares remained registered in Detik Ria's name.

[125] Detik Ria on the other hand maintained equally forcefully that apart from the 49% shareholding not being actually registered in the name of Prudential the agreements had been substantially performed.

Detik Ria's position on performance

[126] For Detik Ria, learned counsel emphasised that s 67 of the Insurance Act 1996 prohibited not only the sale or transfer of shares in excess of 5% in the insurer, but also the acquisition of such 'interest' in the shares without the approval of the Minister.

[127] Detik Ria pointed to the affidavit evidence filed on behalf of Prudential to contend that there was such an acquisition of interest in the put option shares which translated in t urn to substantial performance. Learned counsel highlighted the following factors:

(a) recognition by Prudential that the exercise of the option was irrevocable;

(b) payment of the purchase price;

(c) Detik Ria being precluded from dealing with the option shares; and

(d) Prudential's admission that the option shares were held in trust by Detik Ria for the benefit of Prudential.

[128] In support of these contentions Detik Ria referred in detail to the contemporaneous documents supporting these matters. We shall refer to the same in the course of the analysis on this point.

Prudential's position on performance

[129] Prudential by way of response maintained that the allegations of effective or substantive performance of the CPOA and SCPOA were baseless. Prudential maintained that the contention that it acquired the interest and control of the option shares even without completing the sale and enjoyed beneficial ownership as well as control over the voting rights of the option shares was without merit. It pointed to cl 7.1(iii) of the memorandum of deposit that provides that Detik Ria would vote on the option shares at the annual general meeting of SHS in a manner Prudential 'may direct if so reasonably required'. Clause 7.1(iii) provides:

> Each of the Chargor [Detik Ria] and the Shareholders [Detik Ria's Shareholders] hereby undertakes with the Chargee [The Prudential Assurance Company Limited] that:
>
> (iii) it or he will vote at all meetings of the Board of Directors of the Chargor and/or the Company [SHS] and general meetings of the Chargor and/or the Company in such manner in order not to prejudice the interests of the Chargee and shall, if so reasonably required by the Chargee, vote at such Board meetings and general meetings in such manner as the Chargee may direct.

[130] Prudential maintained that despite the existence of this option, the clause was never exercised by it. In support of this Prudential pointed to the fact that Detik Ria voluntarily executed all board resolutions from 2002 to 2017 and executed all shareholders' resolutions of SHS over the same period, volutarily too, in its capacity as a 49% shareholder of SHS.

[131] Therefore, Prudential had not, it submitted, taken or made a single action or decision in SHS without the knowledge and approval of Detik Ria. And to this end, Detik Ria is still reflected as a 49% shareholder of SHS.

Our analysis of this issue

[132] We considered the evidence before us as available on record holistically, as well as the submissions of learned counsel for the parties. Having done so, as stated in our ex tempore judgment, we concluded that the factual matrix over a period of 16 years, with particular emphasis between 2009 and 2018, disclosed that the CPOA and SCPOA were substantively put into effect, such that Prudential enjoyed a degree of control and authority over the option shares which enabled it to effectively determine how SHS, the insurer, was to take decisions or function. This was not compatible with Detik Ria having real ownership of the 49% as would be expected from a perusal of the share register.

[133] We found that the issue of whether there had in fact been performance, in part or otherwise, to be a contentious issue as the affidavits filed in relation to the originating summons contained conflicting issues of fact. It is equally apparent from both the written and oral submissions of counsel during the course of the hearings that this was a disputed issue.

[134] As stated in the Privy Council case of *Tay Bok Choon v Tahansan Sdn Bhd* [1987] 1 MLJ 433; [1987] CLJ Rep 24; [1987] MLRA 68 where, in an originating summons, there are conflicting issues of fact, and there is no cross-examination on the affidavits, the proper course to adopt is not to attempt to determine the truth of the matter on the basis of the conflicting averments, but to turn to documentary evidence or agreed matters to ascertain, as best may be done, the issue in dispute.

[135] We found that the documentary evidence produced in the course of the hearing provided the best basis on which to assess this issue of whether there had been performance or not. This in turn determines whether there was a contravention of the regulatory requirements or not.

[136] The relevant and contemporaneous documents include:

(a) cl 2.1 of the SCPOA deferred the completion of the Put Option until the requisite regulatory requirements were fulfilled to a future date 'without limit in point of time'. However, the deferred completion was subject to the payment of an initial deposit as detailed below, which required in exchange, the delivery of the share option certificates in escrow — blank and available for Prudential to complete. This meant that Prudential could, on this exchange happening, choose to transfer the shares to its name at any time or to make a third party of its nomination a shareholder.

To that extent it can be said that there was *no complete deferment* until the consent of the Minister or Bank Negara (as provided in the agreements) was obtained. With this exchange namely the reciprocal payment of money and exchange of share certificates it may be said that parties had moved further on in the transaction such that Detik Ria received compensation (almost fully) and Prudential acquired control over the transfer of the option shares as it held all the relevant certificates in a state of readiness to effect a full transfer. This appears to amount to an acquisition of an interest in the option shares;

(b) cl 2.1.1 of the SCPOA requires the payment of an initial deposit of RM69.3m towards part payment of the purchase consideration in return for which Detik Ria was to deliver duly executed, undated and unstamped blank transfer forms to Prudential. However, Prudential paid virtually the full purchase price of RM 109,746,661.57 save for a balance sum of RM541,371. This goes towards showing that there was performance of a material part of the agreements. It was submitted for Prudential that the payment of the purchase price 'upfront' is not unusual. However, we were not convinced by Prudential's argument because this was not merely the payment of the deposit, but as of 2009 they paid the equivalent of 99.5% of the purchase price, well beyond the deposit sum of RM69.3m.

Moreover, there was no evidence of efforts taken to expedite the procurement of consent from the Minister (or even Bank Negara' s approval) which would be expected given the virtually full payment of the purchase price for the option shares. Detik Ria argues that this was so because Prudential effectively enjoyed the interest and control of the 49% shareholding. That would appear to be the effect of the SCPOA and the memorandum of deposit;

(c) this additional sum of RM39.7m, paid pursuant to cl 2.1.2 of the SCPOA, provides that on each occasion of Prudential being able to complete the purchase of some or all of the option shares, Prudential (or a person nominated by Prudential) may elect to purchase such option shares. This clause envisages and having been performed discloses a course of conduct showing that the parties conducted themselves from this point on as if the sale of the Detik Ria shares was effectively completed;

(d) cl 2.2 stipulates that until the final deferred completion date and payment of the balance consideration, Detik Ria shall remain the beneficial owner of the option shares. It goes on to authorise Prudential to complete the transfer forms with the details of the proposed transferee and to 'do all such acts and things as may be necessary to effect such transfer' on the deferred completion date. But cl 2.3 of the SCPOA in turn provides that Detik Ria was not to dispose of, transfer or deal with the 49% shareholding and that Detik Ria was to render all assistance and support as reasonably required by Prudential in relation to facilitating the business of the insurer. This is not disputed by Prudential who rely on it to show that the request for Detik Ria to comply with their directions was only if the directions were 'reasonable'. However, in a situation where an entity is the actual beneficial owner of the shares, there can be no such impediment placed in relation to its dealing with shares which it owns. This is therefore evidence of increased control by Prudential over the subject shares. The fact that Prudential paid Detik Ria for the shares does not detract from the fact that parties were performing material parts of the CPOA. The parties effected almost the entirety of the sale transaction save for the payment of 0.5% of the purchase price and the actual legal transfer of the shares from Detik Ria to Prudential or its nominated third party purchaser. Such performance is not envisaged in relation to s 67 of the Insurance Act 1996 which requires that the Minister's consent is obtained before any such substantive steps are taken;

(e) while therefore acknowledged as a 'beneficial owner', Detik Ria, from the content of the SCPOA as outlined above appeared to be merely holding the shares in name, while control of, and over, the option shares passed to Prudential. This was in exchange for the consideration price which Detik Ria accepted. This shows a clear progress from the initial CPOA which drew the line clearly between Detik Ria and Prudential in relation to the ownership and control of the option shares. The CPOA envisaged that until and unless regulatory authority was obtained no exchange in ownership or interest would or could proceed because a conditional contract does not come into existence until the condition precedent, here the requisite approval, is obtained;

(f) however, with the advent of the SCPOA which it must be remembered was executed some seven years later, in 2009, and without the consent of the regulatory authority having been obtained and without any prospect of such approval being obtained expeditiously, it appears that parties decided to progress the agreements further by payment of most of the purchase price and in exchange for Prudential to necessarily have greater control over the option shares. This is borne out by the foregoing clauses:

(i) Detik Ria and its shareholders were prohibited from dealing with its shareholding in SHS, without the prior written consent of Prudential Assurance (cl 7.1(i));

(ii) Detik Ria and its shareholders would vote at meetings of the Board of Directors of Detik Ria and/or SHS in such manner so as not to prejudice the interests of Prudential Assurance and, if so reasonably required by Prudential Assurance, vote at such Board meetings and general meetings in the manner directed by Prudential Assurance (cl 7.1(iii)); and

(iii) Prudential Assurance was entitled at any time without notice to Detik Ria or its shareholders, and without Detik Ria's or its shareholders' consent, to complete the blank share transfer forms deposited with Prudential Assurance and effect the transfer of the shares to Prudential Assurance or any other person that Prudential Assurance may think fit (subject to cl 2.1 of the CPOA) (cl 3.3).

(g) such a progression of the CPOA and SCPOA coupled with the memorandum of deposit had the effect of upsetting the balance achieved in the CPOA, which clearly recognised that the disposal and acquisition of the option shares could not come into being without the consent of the Minister and other regulatory approvals. The progression of these agreements vide the SCPOA by reason of the very long interval between 2002 and 2009 simply to obtain regulatory consent, had the effect of causing a shift from the boundaries initially prescribed under the CPOA, such that parties effectively performed a substantive portion of the agreements, save that it was not reflected legally;

(h) to summarise, the point at which it could conclusively be said substantial performance occurred was at the end of 2009, by which point RM71.3m considerably more than half the purchase consideration, had already been paid to Detik Ria. Additionally, in early 2009, the parties signed the memorandum of deposit granting considerable control to Prudential of Detik Ria's shares.

Other relevant evidence of performance

(i) here is also the letter of 24 September 2018 from Bank Negara to Prudential which provides, inter alia, as follows:

> ... We refer to the Bank's letter dated 16 April 2002, 19 January 2010, 21 December 2011, 8 January 2015, 11 April 2017 and subsequent correspondences as well as the recent meeting between the Bank and Prudential Plc on 30 August 2018 in relation to the requirement for Prudential Corporation Holdings Limited (Prudential) to divest its effective interest in shares in excess of 70% in Prudential Assurance Malaysia Berhad (PAMB) to domestic investors.

From this letter it is clear that Prudential held out that it had shares in excess of 70% in Prudential Assurance Malaysia Bhd, the licensed insurer. This reflects

several things — firstly that Prudential itself acknowledge that it 'owned' or controlled in excess of 70% of the shareholding of the insurer, which it could not do, unless it effectively controlled or had acquired Detik Ria's option shares together with its own 51% shareholding. Otherwise, it could only have held out that it was the owner of 51% of the insurer;

(j) learned counsel for Detik Ria pointed to the fact that dividends in the sum of RM4.2m were issued solely to Prudential between 2009 to 2018. This is disputed by Prudential. Suffice to say that in the affidavit of Piet Pascal of 13 December 2019 at para 12 the deponent states that SHS, the sole shareholder of the insurer, Prudential Assurance Malaysia Bhd, declared and paid interim dividends to Prudential as the preference shareholder pursuant to resolutions approved by the board and shareholders of SHS between 2009 to 2018. Those resolutions had to be approved by Detik Ria as the 49% shareholder. To that extent, Detik Ria submitted that Prudential cannot say that they did not benefit from the voting rights of the 49% for at least nine years. Detik Ria voted so as to allow such payments to be made as it was accepted that Prudential should receive these dividends, rather than itself. In any event there were sufficient clauses present in the memorandum of deposit and SCPOA to require Detik Ria to vote as it did;

(k) it was further submitted that the Constitution of SHS required such dividend payments to cease as of 2013 and for payments of profits of SHS available for dividends to be applied in payment of dividends on the ordinary shares of the company in proportion to the amounts paid up or credited as paid up thereon respectively. As such Detik Ria maintains that it ought to have been paid its portion of dividends between 2013 to 2018. This however is disputed by Prudential that maintained orally that the articles were amended. The point to be made here is that whatever the situation, cl 3.2 of the memorandum of deposit required Detik Ria to hold all dividends it receives 'in trust on behalf of and for' Prudential. As such Detik Ria had no option but to vote for the distribution of dividends to Prudential, particularly as it had received virtually the full consideration for the option shares. This is therefore yet another instance evidencing performance of the CPOA despite the absence of the consent of the Minister;

(l) cl 7.1(iii) reproduced above is further evidence of effective performance of the CPOA as it evidences Prudential's virtually complete control over the 49% shareholding of Detik Ria, in relation to voting. Detik Ria had to vote in accordance with what was required of it by Prudential because it had received the consideration. The passing of consideration and the exchange of shares in everything but legal title is performance; and

(m) it is also in evidence that Prudential engaged in talks with potential domestic investors including KWAP and EPF to dispose of its interest in excess of 70% so as to comply with the 70% foreign equity cap. This was even before Bank Negara gave its approval in principle for the acquisition vide its letter of May 2018. This again is evidence of Prudential conducting itself as if the acquisition had been completed such that performance is established.

[137] In light of the totality of the documentary evidence, objectively viewed, it appears clear to us that the CPOA and the SCPOA were effectively or substantially performed. There was no clear rebuttal of these matters by Prudential.

Issue (g): What is the effect of the substantive or material performance of the CPOA and SCPOA?

[138] It follows that the CPOA and SCPOA were substantially or effectively performed without the consent of the Minister of Finance between 2009 and 2018. Such performance was therefore carried out in contravention of s 67 of the Insurance Act 1996.

[139] From the outset in relation to issue (b) where we considered the importance of such consent, we concluded that the consent of the Minister is an important and fundamental statutory requirement that is mandatory in the interests of the public. The purpose of s 67 of the Insurance Act is to ensure government oversight of the disposal of shares in insurance companies — it is crucial to the public that those in control of such a vital industry of public importance comprises persons or entities that meet the requirements as adjudged by the Minister of Finance. Therefore, where such an essential requirement was not complied with, the court cannot give effect to the agreement.

[140] Such an infraction goes to the root of the purpose and object of the Insurance Act 1996, so that a failure to comply is not a mere irregularity but an illegality which affects the basis of the agreements. It follows that a contravention has the effect of rendering them unenforceable and void. The failure to procure consent prior to performance is not a contravention of a regulation or a secondary or ancillary condition, which may warrant a lesser response, justifying the viability of the agreements as still being capable of specific performance.

[141] The fact that the requisite consent of the Minister of Finance (although understood by the parties erroneously to mean the approval of Bank Negara) comprised a condition precedent to the coming into existence of the agreements evidences the fundamental importance of procuring such consent

prior to effecting or allowing the agreement for the sale of the option shares to be performed. As Prudential maintains that it is a condition precedent of the agreements, it is anomalous to such a legal stance that substantial or effective performance does not amount to a contravention of a fundamental condition.

[142] As we have explained at some length earlier, the effect of performance of the CPOA and SCPOA amounts to performing an acquisition and disposal of more than 5% shareholding in an insurer without the consent of the Minister of Finance. As this is in contravention of a fundamental aspect of the statute, it cannot be waived as a mere technical irregularity. Notwithstanding that there may be a penalty imposed for such contravention, our construction of the statute in the context of its purpose and object shows that such a contravention renders the CPOA and the SCPOA unenforceable. Put another way, the manner of performance of the contract, and its actual performance, being in contravention of a specific statute, ought not to be countenanced and enforced by this court.

[143] The effect of performance is that the share option agreement namely the sale and acquisition of the shares was completed, such that the consent of the Minister of the Finance could no longer be obtained as the ownership of the shares had effectively passed to Prudential, save in title. The Minister could not give consent for agreements that had already been performed. This therefore goes to the root of the purpose and object of the Insurance Act 1996 as expounded earlier in issue (b).

[144] Further and alternatively, in view of the importance of the consent of the Minister of Finance, as pointed out in *St John*'s, it is apparent that such performance shifted/transferred the agreements from a class of contracts that fell into a class of conditional or contingent contracts which would not be performed until such consent was obtained and were therefore valid and enforceable, to a class of contracts, which having been performed without the requisite mandatory consent, became contracts prohibited by statute. And that prohibition rendered the CPOA and the SCPOA unenforceable.

Issue (h): Did the CPOA and the SCPOA remain specifically enforceable or become void such that specific performance is unavailable?

[145] As we have concluded that the CPOA and SCPOA cannot be specifically enforced by reason of a contravention of the Insurance Act, does such contravention render the contract void?

[146] In keeping with what we have explained at length in relation to issue (d), this is a contract where, to use the words of Devlin J in *St John Shipping Corpn v Joseph Rank Ltd* [1957] 1 QB 267; [1956] 3 All ER 683, 'the way in which

the contract was performed turned it into the sort of contract that was prohibited by statute'. Likewise, the CPOA and SCPOA are not agreements that were void ab initio, but agreements which became prohibited by statute, and therefore unlawful and consequently, void.

[147] If so, are the agreements void by reason of *s 33 pertaining to contingent contracts*? In this regard, we are broadly in accord with Detik Ria's submission that the present agreements *became void* due to an application of s 33 of the Contracts Act 1950:

> 33 Enforcement of contracts contingent on an event happening
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) *If the event becomes impossible, such contracts become void*

[148] On the present facts, the contract was contingent upon the event of the Minister of Finance's consent. This event became impossible at the point at which substantial performance of the contract was effected, without such consent. *It is not possible for the Minister of Finance to give his consent for the performance of a contract that has already been performed*.

[149] The present appeal is similar to the case of *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 ('Sharidal'). In *Sharidal*, an agreement to sell property *became void* because of the Foreign Investment Committee's refusal to approve the sale — a decision which neither party in that case had control over.

[150] A condition requiring the occurrence of an event beyond the parties' control before the contract comes into effect is a paradigm example of a contingent condition within the ambit of s 33. In this regard the following exposition in *Sharidal* is instructive:

> It is therefore obvious that the parties have entered into a contract of sale *contingent upon the approval of the transaction by the FIC over which the parties had no control*. There was no promise, nor guarantee that such approval would be given. *Such a condition, in our judgment, is more than a mere essential stipulation of the contract, a breach of which entitles an innocent party to regard itself as discharged from further performance and to sue for damages. It is, however, a condition which is known in the law of contract as a contingent condition, the effect of which is that a contract shall not take effect unless and until the condition is fulfilled* (see *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 KB 297 304 — per Denning, LJ — and *Property and Bloodstock Ltd v Emerton Bush v Property and Bloodstock Ltd* [1967] 3 All ER 321 330 — per Sachs, LJ). Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely

A ascertained that the condition could not be fulfilled. *This is in effect laid down by section 33(a) of the Contracts Act* ...

[151] Our facts are slightly different in that there was no outright refusal by the Minister; there was only confirmation that there was no prior approval given. Nevertheless, the underlying legal reasoning is the same. When the refusal was given in *Sharidal*, approval was not given and therefore the contract *became void*. In the present case, consent was never given and the contract therefore *became void*.

[152] Prudential argues that because the contingent condition has not occurred ie approval, the contract is still valid and subsisting such that i t can be enforced by way of specific performance. The flaw in this argument, as alluded to earlier, is that the contract has in large part already been carried out. Put another way, the contract has already been carried out without the Minister's approval; the respondents, and the appellant for that matter, cannot pretend the contract is inchoate and has not yet breached the Insurance Act. Accordingly, the CPOA and SCPOA are void.

Issue (i): What is the available remedy? Does s 66 come in to play?

[153] Since the contract is found to be one that *became void*, we found that s 66 of the Contracts Act 1950 is relevant and applicable to determine the remedial obligations of the parties.

[154] Section 66 reads as follows:

> 66 Obligation of person who has received advantage under void agreement, or contract that becomes void.
>
> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[155] To determine whether s 66 can and should be applied to the present facts, it is necessary to understand the origin and purport of the section.

[156] The starting point must be to remind ourselves of Professor Visu Sinnadurai's prescription that 'Section 66 is a wide provision which has no direct parallel under English law' (as also noted by Ravinthran Paramaguru JCA in *Public Bank Bhd v Ria Realiti Sdn Bhd & Ors* [2021] 4 MLJ 537). It is therefore incorrect to speak of s 66 solely by reference to English principles of unjust enrichment or restitution without a critical analysis of the extent to which it applies within our jurisdiction, where the law of contract is codified.

[157] There is good reason for this. In the fourth edition of Pollock & Mulla, written by the original authors themselves, their commentary on the general purport of s 65 of the Indian Contracts Act 1872, a provision that is *pari materia* with, and comprises the origin of our s 66, was as follows:

> The matter corresponding to this ... is scattered about English books in the shape of technical rules and exceptions unintelligible, as usually stated, to any one who is not acquainted, not only with modern English law, but with the formulas of the ancient common law system of pleading which has been obsolete in England for half a century.

[158] An analysis of how the Indian Contracts Act 1872 came about also tells us that the provisions of this Act are not an exact replica of the English common law. The Third Indian Law Commission was appointed in 1861 and in 1866 published a report that would, in large part, form the basis for the Indian Contracts Act 1872 (*The Report of the Indian Law Commissioners on the Subject of Contracts* (1867–68) PP HC, Vol xlix). In this report, it was acknowledged by its authors that they 'deemed it expedient to depart, more or less, from the English law in several particulars' (see Swain, 'The Law of Contract 1670–1870').

[159] It is no doubt true that the Act attempted to codify large parts of English law. Nevertheless, the fact that the Act is not a carbon copy of the English common law of that time means that the Malaysian courts' first recourse should be to the specific terms and purport of the statute, and not the English common law without an appreciation of its compatibility with s 66 itself.

[160] Similarly, where caselaw is referred to from other jurisdictions in relation to the Contracts Act, the first point of reference ought to be jurisdictions that share a similar legislative framework. Again, this is not to say that English principles of contract are irrelevant to interpreting the Contracts Act 1950; it simply means that where they are applied, they must be assessed for compatibility with the terms and context of our Contracts Act 1950.

[161] The further point is that s 66 cannot be construed as an import of, to use the words of Pollock & Mulla, any one of the 'technical rules' of English law at the time. Section 66 is intended to be a wide-ranging provision, that reflects a broad and general principle of *restoration*. In essence, that parties are bound to restore an advantage received where their contract becomes void for any reason (see also Abdul Wahab Patail J's description of s 66 in *Securities Commission v Omega Holdings Bhd & Ors* [2007] 3 MLJ 284 as reflecting a 'general principle of restoration').

[162] Indeed, this is supported by the suggestion that s 65 of the Indian Contracts Act (and therefore s 66 of our Contracts Act 1950) is based on the

Roman principle of *condictio causa data causa non secuta* (*Menaka v Lum Kum Chum* [1977] 1 MLJ 91 ('Menaka')). This principle is described as being 'used in many different situations where the solvens rendered performance in order to achieve an intended purpose (*ut aliquid sequatur*), but the purpose was not achieved' (Marek Sobczyk, *Application of the Concept of Condictio Causa Data Causa Non Secuta in Pecuniary Settlements between Cohabitants, Comparative Law Review* (Vol 18) pp 29–47). In other words, it is a principle used to restore parties to their original position where the object of their contract, in this case the sale of shares, fails.

[163] Even when looked at in the specific context where there has been a contravention of the law or an illegality, the English law of contract prior to the codification in India, bears out this general principle of restoration.

[164] Perhaps the best exposition of this principle of restitution or restoration is by Lord Sumption who dissented in *Patel v Mirza* [2016] UKSC 42 ('Patel') but whose historical analysis of the law is flawless:

> 250. ... *The effect is to put the parties in the position in which they would have been if they had never entered into the illegal transaction, which in the eyes of the law is the position which they should always have been in*.
>
> 251. *The judges who first formulated the modern law of illegality at the end of the 18th century had no difficulty about this. In Smith v Bromley (1760) 2 Doug 696n, 697, one of Lord Mansfield's earliest statements on this area of law, he thought that restitution of an illegal consideration was 'necessary for the better support and maintenance of the law'. In Neville v Wilkinson (1782) Lord Chancellor Thurlow referred to this statement and 'declared his opinion, that, in all cases where money was paid for an unlawful purpose, the party, though particeps criminis, might recover at law; and that the reason was, that if courts of justice mean to prevent the perpetration of crimes, it must be not by allowing a man who has got possession to remain in possession, but by putting the parties back to the state in which they were before*'. This was the basis on which relief was granted, at any rate by Mellish LJ and Bagallay LJ, in *Taylor v Bowers* (1876) 1 QBD 291 traditionally regarded as the leading case, and by Lord Atkinson delivering the advice of the Privy Council in *Petherpermal Chetty v Muniandi Servai* (1908) LR 35 Ind App 98, 103.
>
> (*Patel*, [250] and [251]; see also Lord Mance in [195]–[197] of *Patel* who makes the same point.)

[165] While cautioning against the conflation of the law in relation to the use of the word 'restitution' in the Malaysian context because of its connotations to the separate law of unjust enrichment as a cause of action, the thrust of the observation above is still clear: where there is a contravention of the law, the court can restore parties to the position they were, as if they never entered the contravening transaction. This is a trite principle of recovery or remedies under the law of contract.

[166] The point to this exposition of s 66 therefore is that it is a section both broad and wide in its ambit. Section 66 is the statutorily prescribed remedy for situations where there is part performance of a contract and, for whatever reason, be it frustration or an illegal act, the contract becomes or is discovered to be void. This is why s 66 is housed within Part V of the Contracts Act: a part entitled 'Of the Performance of Contracts' — an indication that s 66 is targeted toward contracts which have been partially performed but is then discovered to be void.

[167] This is a remedy or more accurately perhaps, a statutory consequence, that requires judicial discretion in order to determine the situations in which this broad-based principle is applicable. Our courts have, in this vein, routinely held that s 66 is a discretionary remedy (*Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393 at p 411). The principles under which this discretion should be exercised have been canvassed in our caselaw.

[168] We wish to draw attention however, to the specific context of a breach of a statutory prohibition and the need to give primacy to the statutory purpose of the prohibition. When considering if a contract is void for the contravention of a statute, the statutory purpose is analysed to evaluate if said purpose of that statute necessitates a finding that the contract is void. When assessing the statutory purpose where the s 66 enquiry is concerned, the statutory purpose is analysed to evaluate if the purpose of the statute militates for, or against, the grant of a s 66 remedy.

[169] As stated earlier, the importance of executive oversight over a vital industry necessitates a finding that the contract is void, so that the public interest is not put at risk. However, such a statutory purpose does not in any way militate against restoring the parties to their original positions. In the context of Prudential, the return of the purchase price expended for shares that they will now no longer own, and for Detik Ria the restoration of its effective ownership and control of the 49% shareholding, together with other benefits, if any, it lost during this period. In other words, the need for executive oversight is in no way harmed or prejudiced by returning the parties to their original position.

[170] It must be noted that it will often be the case that the statutory purpose does not militate against the grant of the s 66 remedy. The reason for this, is well-articulated by Lord Sumption in *Patel*:

> 250. Of course, in order to demonstrate that the basis for the payment had failed, Mr Patel must say what that basis was, which would necessarily disclose its illegality. In my opinion, the reason why the law should nevertheles s allow restitution in such

A a case is that it does not offend the principle applicable to illegal contracts. That principle, as I have suggested above, is that the courts will not give effect to an illegal transaction or to a right derived from it. *But restitution does not do that. It merely recognises the ineffectiveness of the transaction and gives effect to the ordinary legal consequences of that state of affairs. The effect is to put the parties in the position in which* B *they would have been if they had never entered into the illegal transaction, which in the eyes of the law is the position which they should always have been in*.

In other words, as put by Niamh Connolly in his 2013 article entitled 'Re-examining Illegality in Restitution: A reason to deny restitution, or to grant it?' Edinburgh, Scotland: The Society of Legal Scholars, 20:

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> ... restitution operates independently of the intentions or plans of the parties, so granting restitution does not usually 'aid illegality'. On the contrary, ordering mutual restitution of benefits transferred obliterates any practical effects of the illegal act. It thwarts the parties' illegal objective, returning them to the status quo ante.

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[171] Again, while the language of restitution is used in much of the material cited, it means or applies with equal force to the remedy of *restitutio in integrum* or, in simpler terms, placing the parties back in their original position, as E provided for under s 66. Putting parties back to the position they were in before the il legal act, if anything, thwarts the illegal objective as opposed to assisting it. Therefore, caution should be exercised before holding that the mere fact that parties entered into a contract that *subsequently became illegal* by reason of their conduct in the performance of the contract, *automatically precludes the* F *application of the remedy afforded in s 66*.

[172] Indeed, this is not unfamiliar to our courts. This line of reasoning has been recognised early on by the Malaysian courts in *Menaka*:

> The effect of s 65, (s 66 of the Malayan Contracts Ordinance) is that, in such a G situation, it enables a person not in pari delicto to claim restoration since it is not based on an illegal contract but dissociated from it. *That is permissible by reason of the section because the action is not founded on dealings which are contaminated by illegality. The party is only seeking to be restored to the status quo ante*.

H **[173]** In the instant case, it is evident from this judgement that the contracts *became void* in the course of performance. Therefore, s 66 is available as a remedy, as the factual matrix in the appeal falls within the second limb of s 66. Can it be then said that by reason of the illegality occasioned by the performance of the agreements without the consent of the Minister of Finance, I the parties are precluded from the s 66 remedy because of the existence of an 'illegality' in terms of the contravention of a statute?

[174] It is of note also that the Indian Courts are in accord with us on this point (*Budhulal v Deccan Banking Company* AIR 1955 Hyd 69 as endorsed by

the Indian Supreme Court in *Ramagya Prasad Gupta & Ors v Murli Prasad & Ors* (1974) 2 SCC 266):

> ... There may be cases where parties enter into an agreement honestly 'thinking that it is a perfectly legal agreement and where one of them sues the other or wants the other to act on it, it is then that he may discover it to be void. There is nothing, specific in s 65 Indian Contract Act or its corresponding section of the Hyderabad Contract Act to make it inapplicable, to such cases.

[175] The other factor which militates strongly in favour of the application of s 66 is the fact that the parties might well receive an unjust windfall should s 66 not be applied. The purchase price of RM109m odd paid to Detik Ria was for the shares of SHS. Now that Prudential is no longer acquiring those shares, it is only fair and equitable that the purchase price is returned in full. To determine otherwise would enable Detik Ria to retain its 49% shareholding as well as the purchase price of the same, while Prudential would be constrained to bear the loss of the purchase price. Equally Prudential might well have received dividends of a considerable amount which Detik Ria complains it was deprived of. This too would be untenable. In these circumstances the restoration of parties to the position they were in at the outset serves to provide a n appropriate remedy which is fair and just, as expressly codified in our Contracts Act. More importantly its application is expressly provided for in the Act in respect of contracts which 'become void'.

Discovered to be void and knowledge of illegality

[176] Although not strictly necessary for the resolution of this appeal, we go on to consider the position where a contract is 'discovered to be void' under the first limb of s 66. This is because of the dichotomy of reasoning found in the caselaw relating to illegality.

[177] In *Public Bank Bhd v Ria Realiti Sdn Bhd & Ors* [2021] 4 MLJ 537, Ravinthran JCA made this significant observation:

> Section 66 has been said to embody a restitutionary principle which has no parallel in common law. It may have been inspired by rules of equity but resort to it is not the same as seeking relief under equity. A claim under it is also not a claim under the terms of a void contract but it is for restitution from a party that received an advantage under it. *And section 66 does not require absence of knowledge of illegality or lack of intention to contravene the law as a precondition for its invocation* ...

[178] Indeed, in *Tan Chee Hoe & Sdn Bhd v Code Focus Sdn Bhd* [2014] 3 MLJ 301, the Federal Court granted s 66 relief despite the fact that both parties had knowledge of the illegality, namely the contravention of s 132C of the Companies Act.

(See also: *Paragon Union Bhd v Prestamewah Development Sdn Bhd & Anor and another appeal* [2018] 4 MLJ 307.)

[179] Generally our courts have taken the position that in order to invoke s 66, parties are required to have no knowledge of the illegality. To that end parties are required to come to court with clean hands in order to succeed in a claim under s 66. In an article entitled 'Relief For Claims Based on Contracts Tainted by Illegality' on Lex; In Breve, University of Malaya Law Review, Choong Shaw Mei, lecturer at the Faculty of Law, University of Malaya, examines the premise for the application of s 66 in considerable depth.

[180] As pointed out by the learned author the requirement for the absence of knowledge of the illegality was not the position taken in the days when s 66 was known as s 65 of the Contract Enactment 1899 ('the Contract Enactment'). In support of this, reference is made to the case of *Khem Singh v Anokh Singh* [1933] 2 MLJ 228; [1930] CLJU 2; [1930] 1 LNS 2. In that case Elphinstone CJ disagreed with the then prevailing view of the Indian Courts at the time stating:

> The Indian Courts have taken the view that the words discovered to be void limit the operation of the section to cases where a contract is found to be void by reason of some facts not known to the parties at the date of the contract, but subsequently discovered ...
>
> With the greatest respect to the Indian Courts I feel unable to adopt that view. *The words 'when an agreement is discovered to be void' are in general terms. The sect ion is silent as to when or by whom or for what reason the agreement is to be discovered to be void. In my opinion the words 'discovered to be void' would mean no more than 'if found to be void'*. In the course of this suit the Court has found the agreement sued upon to be void In this sense the agreement has been discovered to be void, and section 65 seems to be exactly applicable.

[181] In that case the agreement related to a marriage brokerage agreement and was void for having an object opposed to public policy within the meaning of the then s 23 of the Contract Enactment (now s 24 of the Contracts Act 1950). To that end knowledge of the illegality at the outset of the contract did not preclude the application of s 65 of the Contract Enactment.

[182] In arriving at this decision Elphinstone CJ explained the Privy Council decision in *Harnath Kaur v Indar Singh* AIR 1922 PC 403 as follows:

> It is, I think clear that the decision of the Board as to the applicability of section 65 was not based on the subsequent discovery of the true nature of the rights sold, and that the Board referred to the discovery not as being essential to the applicability of section 65, but for the purpose of ascertaining the time when the period of limitation commenced to run. But even if the case is not an exact authority for the present suit, *it certainly did decide that section 65 applies to an agreement void ab*

initio, and the judgment is not inconsistent with my view that it is immaterial when, or by whom or for what reason the agreement is discovered to be void.

[183] However, this decision was not followed subsequently by the Federal Court, and in *Menaka* (the appeal to the Privy Council from the Federal Court case of *Ng Siew San v Menaka* [1973] 2 MLJ 154), the Privy Council agreed, without much reasoning, with the Federal Court's interpretation of 'discovered to be void' as meaning that both parties were unaware of the illegality. As pointed out by the learned author, the Privy Council then appears to have melded or combined the principle of restitution with the principle underlying s 66 by stating:

> The principle underlying both sections (s 65 of the Indian Contracts Act and our s 66) is the same, and it is that 'a right to restitution may arise out of the failure of a contract though the right be not itself a matter of contractual obligation.

[184] The result is that most case law in this jurisdiction takes the position that parties should not be *in pari delicto* and the illegality of the agreement must be discovered subsequent to the date of the contract. The somewhat varied positions taken in relation to s 66 makes the legal position less than absolutely clear.

[185] For example in *Ahmad bin Udoh & Anor v Ng Aik Chong* [1970] 1 MLJ 82 which was decided three years prior to *Ng Siew San v Menaka* (but which did not take it into account) Suffian FCJ allowed a claim on the basis that there was no evidence that the plaintiff was *in pari delicto* and the illegality was discovered subsequent to its formation. This is the case here. But in *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 (FC) ('Singma Sawmill'), the Federal Court took the position that the landlord was deemed to be aware of the illegality when entering into a contract of the use of the land for a purpose contrary to the express condition on the title and to that extent s 66 was not available. Reliance was placed on another Indian case in interpreting s 66 namely *Kuju Collieries v Jharkhand Mines* 1974 AIR 1892; 1975 SCR (1) 703 where the Indian s 65 was interpreted. The Federal Court construed s 66 to mean that 'a contract which is not in accordance with statutory requirements is no contract at all, and therefore cannot be said to have been discovered to be void under section 66 of the Contracts Act 1950. Nor is it a case of the contract becoming void due to subsequent happenings. The section therefore enacts in statutory form that a contract that is illegal in itself is void and unenforceable by either party'.

[186] However in *Yeep Mooi v Chu Chin Chua & Ors* [1981] 1 MLJ 14 the Federal Court speaking through Salleh Abas FCJ held to the contrary and reverting to its original interpretation of s 66 held that:

> In our view this case f its in squarely with the words of s 66 as an agreement which is 'discovered to be void' does not mean that the contract is void on discovery or void because of discovery of illegality. *It means what it says, in that the contract was void ab initio without the parties at the time being aware of the true legal position*. It is only later that the contract is found to be void and so they became aware of i ts voidness. We are of the view therefore that s 66 of the Contracts Act applies to this and the appellant is entitled to the restitution of her money by the pawnshop which received an advantage from its use (*Menaka v Lum Kum Chum* [1977] 1 MLJ 91).

[187] In the varied positions adopted by our courts over the years it would appear that the original position adopted by Elphinstone CJ in *Khem Singh v Anokh Singh* has considerable appeal. Section 66 was given a broad construction allowing for the remedy of restoration or restitution to the *status quo ante* in a suitable case. What is key to Elphinstone CJ's interpretation of s 66 (then s 65) is that knowledge of the parties does not necessarily bar a s 66 remedy. Secondly, it was construed as being applicable in cases where the contract is void ab initio. This also accords with s 66 appearing in Part V of the Contracts Act 1950, which relates to the 'Performance of Contracts' and statutorily prescribes it as a remedy where a contract is discovered to be void, without any reference to knowledge of the parties. This is a codified statutory remedy available where the contract is void and ought not to be stultified unnecessarily, particularly when there is no express preclusion of the remedy to cases where there was knowledge of the illegality as of the date of the contract. Put simply, knowledge of the illegality is not a complete bar to the s 66 remedy.

[188] This is also in accord with the early historical position in the common law as referred to by Lord Sumption in *Patel* where the restoration of benefit was viewed as ensuring that the persons who procured an advantage or benefit by virtue of an illegality or an illegal transaction were not allowed to retain possession of the same as that would be contrary to principles of equity and fair play.

[189] This may appear to be at odds with what the courts have pronounced in the cases of *Singma Sawmill* and *Triple Zest Trading & Suppliers & Ors v Applied Business Technologies Sdn Bhd* [2023] 6 MLJ 818 (FC) ('Triple Zest'). However, these are cases where the illegality was one that struck at the core primary obligations of the transactions under their respective statutes. In *Singma Sawmill* for instance, the landlord violated an express and clear condition on the title; indeed, the breach was so intentional that Raja Azlan Shah CJ termed it 'wilful, if not contumacious'. His Lordship also clearly regarded the appellants in that case as using the subject matter of the agreement for an 'unlawful purpose'.

[190] It is noteworthy that in interpreting the decision in *Singma Sawmill*, the Federal Court in *CME Group Bhd v Bellajade Sdn Bhd and another appeal*

[2019] 1 MLJ 141, took note of the uniqueness of the facts of that case and said as follows:

> [119] The Federal Court in deciding *Singma Sawmill* did not do so in a vacuum but did so against the backdrop of a number of crucial factors. These factors include:
>
> (a) the land was under the category of agricultural land whereas the tenancy agreement required the land to be under the category of industrial land;
>
> (b) prior to entering into the tenancy agreement, the proprietor had applied unsuccessfully to change the category of land use from agricultural to industry;
>
> (c) a representative from the state government warned the tenant that it was operating the factory illegally and in breach of the express condition;
>
> (d) the state department informed the proprietor of the breach and requested that it remedy the situation but this was ignored; and
>
> (e) no approval for the change of category or condition had been obtained from the state authority. It was in defiance of the state authority's decision that the tenancy agreement was entered into. In fact, so egregious was the breach in *Singma Sawmill*, that Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was) termed it 'wilful, if not, contumacious'.

[191] To this extent, *Singma Sawmill* ought to be construed in the context of its particular facts.

HOW IS S 66 TO BE APPLIED?

[192] Therefore, the grant of the s 66 remedy warrants the formulation of a guide to determining whether the s 66 remedy is engaged or not. Where a contract is 'discovered to be void' or 'becomes void', the guidelines for the application of s 66 are as follows.

[193] First, the centrality of the illegality in the statute is to be considered. This is a matter of construction of the particular statute.

[194] Second, the proportionality of denying s 66 relief to the illegality should be considered. There are numerous factors which should be considered in assessing proportionality:

(a) whether the contract was performed or executed;

(b) whether allowing the claim would defeat the purpose of the prohibiting statute;

(c) the nature and extent of the illegality;

(d) the extent of the culpability of the parties;

A (e) the intent of the parties in embarking on the transaction or omission as the case may be;

(f) the nexus between the illegality and the contract; and

(g) whether the denial of relief is proportionate to the illegality.

B

[195] In this context, the extent of the parties' culpability for the illegality should be considered. Culpability refers to the degree of blameworthiness or responsibility of a person for their actions or omissions that lead to the illegality. Culpability is different and distinct from knowledge. Knowledge C refers to the awareness or understanding of facts or circumstances related to that act or omission. In other words, culpability is a broader concept than knowledge in that it encompasses more than just the intent and mental state of the individual at the time of the act or omission. In short, knowledge is a component of culpability. D

[196] We reiterate that the presence of knowledge alone is not a complete bar to the s 66 remedy but is an important factor to be considered in determining culpability. Culpability, more particularly the extent of E culpability, is one of the decisive factors in determining whether a remedy under s 66 should be granted.

[197] Finally, the court should consider holistically if the denial of relief is proportionate to the illegality.

F

[198] Put simply, the following factors, in this order, may be considered in determining if s 66 relief should be granted:

(a) the centrality of the illegality in the context of the particular statute G breached;

(b) proportionality:

(i) culpability;

(ii) was the contract performed? and

H (iii) is the denial of s 66 relief a proportionate response to the illegality?

[199] The foregoing factors set out in the guidelines are not exhaustive. It is important that these factors are not utilised in a mechanistic and rigid fashion I but considered holistically and given weight in accordance with the facts of the particular case.

(See *Ting Siew May v Boon Lay Choo and Another* [2014] SGCA 28, *Ochroid Trading Limited (formerly known as Orion Trading Limited) & Anor v Chua Siok*

Lui & Anor [2018] SGCA 5 and *Patel*.)

[200] In formulating these guidelines, we have examined case law from various jurisdictions. However, the considerations outlined are derived from the codified provisions of s 66. These guidelines incorporate, without entirely replicating, analytical elements from other jurisdictions particularly Singapore and the United Kingdom. These elements are grounded in common law principles and arise in the absence of an equivalent statutory framework.

[201] In this jurisdiction, given the existence of ss 66 and 24, we are bound to construe the remedy in harmony and in consonance with the provisions of the statute i n the codified law of contract. Indeed, this is the reason why *Patel* cannot be imported in its entirety and applied, particularly in the contractual domain, without consideration of how it fits into the Malaysian context. This is because we have made express statutory provision for how our law of contract is to be applied.

[202] To be specific, caution should be exercised in the application of *Patel* for two reasons.

[203] First, under s 66, the first and primary question is whether the provision applies as a matter of statutory interpretation, considering the context and purpose of the Contracts Act as a whole. *Patel v Mirza*, by contrast, conducts its own common law and policy analysis of whether 'allowing a claim which is in some way tainted by illegality would be contrary to the public interest' (*Patel*, [101]). While Malaysian judges have discretion in applying s 66, this discretion is secondary and subsequent to the statutory analysis determining whether the s 66 remedy is available or not. Introducing *Patel v Mirza* without reference to s 66 would undermine the statutory framework for the operation of s 66.

[204] Second, in English law, illegality is governed by common law principles. In Malaysia, however, illegality is primarily determined by s 24 of the Contracts Act 1950, which explicitly defines illegal agreements. While some illegal acts may fall outside s 24, the determination of illegality in Malaysia is, to a large extent at least, a question of statutory construction, not the common law.

[205] To be clear, this is not to say *Patel* is of no use. Indeed, there are elements of the *Patel* framework that we have found, as will be clear from the subsequent analysis, most helpful in the formulation of the applicable test in Malaysian law. Our point however is simply that the borrowing from *Patel*, and indeed any other jurisdiction, particularly where the statutory context is

A different, must be done in a way sensitive to the Malaysian statutory and legal context.

[206] In this light, we go on to explain the various limbs of the s 66 framework.

B

CENTRALITY OF ILLEGALITY IN LIGHT OF RELEVANT STATUTE

[207] First, consideration should be given to the nature of the illegality. It should be determined if the illegality strikes at the core of the relevant statute and therefore invalidates the transaction or whether the transaction is ancillary to the primary purpose and object to the statute.

C

[208] Where statutory illegality is concerned, reference should be made to the purpose and object of the statutory prohibition that is transgressed. Only once such a purpose is gleaned can one truly appreciate the interplay of the other relevant factors to the determination of whether s 66 is available. It is not tenable to understand how central the illegality is to the contract, without putting into perspective the reason for the statutory prohibition being in place.

D

E

[209] In other words, the statute must at all times be the 'reference point' to determine the relevance of the other factors, as set out in, for example *Nelson v Nelson* [1995] HCA 25 at pp 612–613 per McHugh J from the High Court of Australia):

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> It is not in accord with contemporaneous notions of justice that the penalty for breaching a law or frustrating its policy should be disproportionate to the seriousness of the breach. *The seriousness of the illegality must be judged by reference to the statute whose terms or policy is contravened. It cannot be assessed in a vacuum. The statute must always be the reference point for determining the seriousness of the illegality*.

G

(This passage was affirmed by our Federal Court in *Dahan Cipta Sdn Bhd & Anor v Yong Tshu Khin & Ors and other appeals* [2017] 6 MLJ 638 and our Court of Appeal in *Fusing Construction Sdn Bhd v EON Finance Bhd & Ors* [2000] 3 MLJ 95.)

H

THE ELEMENTS OF PROPORTIONALITY

Extent of culpability of the parties

I

[210] We do not propose to go into any more detail other than to refer to our previous exposition in the earlier paragraphs at [150]–[151].

The extent of knowledge parties have of the illegality has been a factor of much contention throughout the Malaysian caselaw in determining whether a

remedy under s 66 should be granted. Whittled down to its essence, knowledge is not a complete bar to the grant of s 66 relief; nevertheless, the greater the parties' knowledge and culpability of the illegality, the less appropriate it may be to grant relief under s 66.

[211] The reason for this quite simply is that parties should not be allowed to protect themselves against the risk of their illegal transaction being discovered. In other words, where parties knowingly engage in an illegal transaction, they assume the risks associated with it meaning that they become culpable for the illegal act or error in issue. The greater the culpability, the less the likelihood of obtaining relief under s 66. Allowing them to do so under s 66 in such circumstances would undermine the principle that the law should not assist those who willingly participate in illegality.

Has the contract been performed?

[212] In beginning to consider the proportionality of denying s 66 relief, it must first be examined whether the illegal act has already been carried out. Even in the common law of illegality, whether performance of the contract has been carried out has always been of great relevance.

[213] We rely on the observation from the High Court of Australia in the joint judgment of Isaacs, Gavan Duffy and Rich JJ in *Perpetual Executors & Trustee Association of Australia Ltd v Wright* (1917) 23 CLR 185. It was highly relevant that 'In this case no creditors have been defrauded, the illegal purpose has never been in any respect carried into effect, and therefore the [plaintiff] was entitled to succeed'.

[214] This also underlies the statements of Lord Denning in *JM Allan (Merchandising) Ltd v Cloke and another* [1963] 2 QB 340 at p 348 where he proclaimed that 'active participation debars, but knowledge by itself does not' under the principles of the common law.

[215] Suffice to say that it has long been recognised that where the illegal purpose has already been carried out, it is far less likely that a restorative remedy, in our case s 66 relief, is granted. This is due both to the need to encourage parties to withdraw from illegal transactions as well as the fact that *restitutio in integrum* becomes far more difficult where the illegal purpose has *already* been carried out.

[216] While the fact that the illegal purpose has been carried out will often mean that s 66 relief should not be granted, we are reticent to foreclose the possibility of a case falling within the exceptional circumstances that

nevertheless warrants the grant of relief; this is particularly so where *restitutio in integrum* is still practically possible.

Proportionality in the round

[217] The final point that bears noting is the importance of proportionality to the inquiry. To be specific, the courts should ask if denial of the s 66 relief is a proportionate response to the illegality that took place. In this regard, we endorse the observations of the Singaporean Court of Appeal in *Ting Siew May v Boon Lay Choo and another* [2014] SGCA 28 who state (as also reiterated by the Singaporean Court of Appeal in *Ochroid Trading Limited (formerly known as Orion Trading Limited) & Anor v Chua Siok Lui & Anor* [2018] SGCA 5 at [38]):

> 68 In so far as the factor (e) at [66] above concerning the proportionality of denying the claim is concerned, we would observe from the commentary on this factor that it in fact relates to the consequences of denying the claim (see *The Illegality Defence* (2009) at paras 3.135). *Proportionality is therefore not simply one of the factors to be considered, but applies as an overarching principle for the court to determine whether denial of the relief sought is a proportionate response to the illegality*.

[218] Proportionality is therefore not simply a stage in the test but rather an overarching principle that informs the consideration of any of the factors enumerated here or in the caselaw more generally. While these observations are made with respect to the common law of Singapore, where there is no equivalent provision to s 66 — as indeed is true of the earlier observations cited from English and Australian courts — the analysis on the grant of relief in response to an illegality remains eminently logical. It can be analogised to our s 66, particularly given the absence of strict and exhaustive preconditions in our statutory text for its application.

[219] The factors relevant to the exercise of the s 66 discretion such as the purpose of the prohibition, the centrality of the illegality to the contract, or the relative culpability of the parties, are not isolated but interconnected. Proportionality therefore ensures these factors are weighed together, preventing any single consideration from dominating the balance in a manner that would lead to unjust outcomes.

[220] On this point, we reiterate that the mere occurrence of an illegality should not automatically lead the courts to wring their hands and conclude that it would be disproportionate to apply s 66. If anything, restoring the parties to their original position destroys any practical effects of the illegal act. It returns the parties to the status quo ante and, by neutralising entirely the effect of the illegality, often expresses the strongest condemnation possible of the unlawful conduct.

[221] However, the application of the guidelines above may well result in a refusal of the remedy. This is borne out by *Triple Zest* where relief was refused. In that case, the centrality of the illegality to the contract is clear, namely the prohibition against the lending of money without being licensed under the Moneylenders Act 1951 (s 5(2) of the Moneylenders Act 1951). The prohibition in the statute is important because it forbids the levying of extortionate rates of interest levied on borrowers who are constrained to resort to borrowing from such unlicensed lenders. It carries with it great socio-economic ramifications. The object and purpose of the Moneylenders Act 1951 is to deter and disable illegal moneylending agreements. The parties to the illegal contract in *Triple Zest* knew, or ought to have known, that such moneylending is prohibited. Perhaps most importantly the transaction was executed in full. In *Triple Zest*, it was the lender who had deliberately transgressed the law and who sought to recover both the principal and the interest due on this illegal loan. Therefore, proportionality when applied to this matrix of facts justifies the refusal of the remedy. To that end, a denial of the s 66 relief was indeed a proportionate response to the illegality.

THE INSTANT APPEAL

[222] On the facts of the instant appeal, the result is the same whether the classical illegality doctrine is applied to the construction of s 66, or the broader approach outlined here. The former approach requires that there was no knowledge of illegality at the outset, which is the case here. Applying the latter approach, s 66 is available to the parties at the time at which the contract 'became' void and therefore does not detract from the application of the section.

[223] As such s 66 is an appropriate remedy to be applied in the present appeal so as to restore the parties to their original position status *quo ante*.

CONCLUSION

[224] For the reasons set out above, we allowed Detik Ria's appeal with costs of RM200,000 here and below, subject to allocatur, as set out in our ex tempore decision. For completion, we answer the questions of law as follows:

THE QUESTIONS OF LAW

(1) whether, understood in context, the phrase 'enter into an agreement or arrangement' in s 67(1) and (2), Insurance Act 1996 is to be interpreted as applying to contingent contracts within the meaning of ss 32 and 33(a), Contracts Act 1950 such that prior approval of the Minister is a legal prerequisite to enter into such a contract.
Answer: No, in the context of the question above, a contract can be entered

into without the Minister's approval yet being obtained, provided that the Minister's approval is made a condition precedent to the performance of the contract. Neither should such conditional contract be performed without such approval or consent.

(2) with respect to applications for the approval of the relevant regulatory authority under s 67(3), Insurance Act 1996, whether the word 'approval' is to be interpreted as requiring an unconditional and unequivocal approval of the regulatory authority.
Answer: Yes.

(3) whether the 2002 agreement between the respondents and the first applicant relating to th e sale and purchase of shares representing 49% of the share capital of a licensed insurer is unlawful, void and unenforceable pursuant to s 24 of the Contracts Act because it was entered into without the prior written approval of the Minister of Finance, contrary to s 67 of the Insurance Act 1996.
Answer: No, the contract became void pursuant to s 33 of the Contracts Act at the point at which substantial performance of the contract was done without the Minister's approval.

(4) whether the decisions in:

(i) *Coramas Sdn Bhd v Rakyat First Merchant Bankers Bhd & Anor* [1994] 1 MLJ 369 (FC) in holding that a sale and purchase agreement for shares in a bank is unlawful, void and unenforceable for breach of statutory provisions identical to s 67 of the Insurance Act 1996; and

(ii) *Aun Huat & Brothers Sdn Bhd & Ors v Sime Darby Bhd & Anor* [2003] 6 MLJ 49 in holding that Bank Negara acted ultra vires in purporting to withdraw a prior written approval by the Minister of Finance to buy shares in a bank under statutory provisions identical to s 67 of the Insurance Act 1996.

Should be followed in the instant appeal so that there is harmony in our laws governing the banking and insurance industries.
Answer: We decline to answer.

(5) if the 2002 agreement is declared unlawful, void and unenforceable, whether restitution should be ordered pursuant to s 66 of the Contracts Act 1950, and, if so, how should the contracting parties be restored to their positions prior to the execution of the said agreement.
Answer: Yes, parties are to make the necessary applications in the High Court to determine their dispute on the advantage or benefit to be restored.

DISPUTE OVER DIVIDENDS

[225] We also therefore made an order that parties were to make the necessary applications in the High Court to resolve their dispute on the nature and quantum of advantage or benefit to be restored. We did so as Detik Ria sought dividends from its shares in the sum of RM4.2 billion which it alleged was wholly paid to Prudential. In view of the order that benefits (which would include dividends) be restored, it sought its proportion of dividends so as to restore parties to their position as if the agreements had not been performed. However, counsel for Prudential objected to this strenuously on the basis that no dividends were paid to Prudential. It maintained that the sum of RM4.2 billion in dividends was paid out on the preference shares and not the option shares (and thus the question of restoration of dividends would not arise). This was met by the equally strong insistence by Detik Ria's counsel that there was documentary evidence that dividends were indeed paid out and had to be restored. As this is a question of fact, the High Court, we felt was the proper forum, to determine the matter. Hence our order to that effect.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh